CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 115

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO, PETITIONER,

vs.

HORACE HAVEMEYER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 8, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1933

No. 2905

HORACE HAVEMEYER et al. (RUSSELL & Co., Sucrs., S. en C.), Appellants,

v.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO et al., Appellees

TRANSCRIPT OF RECORD—Filed in Circuit Court of Appeals by Leave of Court March 13, 1934

IN THE SUPREME COURT OF PUERTO RICO

No. 5401

HORACE HAVEMEYER et al., as Partners of the Civil Agricultural Partnership Russell & Co., Sucrs., S. en C., Appellants,

v.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO and the MUNICIPALITY OF LAJAS, Appellees

On Appeal from the Supreme Court of Puerto Rico to the United States Circuit Court of Appeals for the First Circuit

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

PETITION FOR APPEAL—Filed April 8, 1929

Now come Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and [fol. 2] Henry B. Orde, members of the civil agricultural partnership of Puerto Rico, Russell & Co., Sucrs., S. en C., and hereby appeal to this Honorable Court from the order rendered and entered by the Public Service Commission of Puerto Rico notified on March 9, 1929, in case J2763, can-

celing that part of franchise number 5 decreed and granted by the former Executive Council of Puerto Rico on March 19, 1901, to the Guanica Land Company which refers to the use of certain waters from Guanica Lake for purpose of irrigation; and the appellants allege:

First. That Russell & Company, Sucrs., S. en C., is a limited civil agricultural partnership; that Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, the appellants herein, are the sole members of said partnership and that as such members the said appellants are the owners by purchase of that part of franchise number 5 granted by the Executive Council of Puerto Rico on March 19, 1901, to the Guanica Land Company which refers to the use of certain waters from Guanica Lake for purposes of irrigation, the said franchise being entitled: "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica." The said franchise is accompanied to this petition for appeal and a true copy of same is made a part thereof as "Exhibit A".

That Horace Havemeyer and Edward S. Paine are citizens of the United States and citizens and residents and domiciled in the State of New York; that Frank M. Welty and Edwin L. Arnold are citizens of the United States and citizens and residents and domiciled in the State of Ohio; that Frank A. Dillingham is a citizen of the United States and a citizen and resident and domiciled in the State of New Jersey; that H. B. Orde is a citizen of Great Britain and a citizen and resident and domiciled in Canada; that Horace Havemeyer, Frank A. Dillingham and Edward S. Paine are managing partners and that Edwin L. Arnold, H. [fol. 3] B. Orde and Frank M. Welty are silent partners of the partnership Russell & Company, Sucrs., S. en C.

Second. That under date of May 26, 1928, the Public Service Commission of Puerto Rico issued an order to show cause, addressed to Russell & Company, Sucrs., S. en C., Ensenada Estates, Inc. and its assignees, Guanica Central and its assignees, and to any other person or legal entity which might have acquired any rights, by grant or purchase, in the franchise mentioned in the first paragraph of

this petition, and ordering them to appear before the said Public Service Commission to show cause why the said franchise should not be totally canceled; that a true copy of said order to show cause is accompanied to this petition as a part thereof as "Exhibit B".

Third. That the Municipal Assembly of Lajas, on the 24th of February, 1928, adopted a resolution an exact copy of which is joined to this petition as "Exhibit C"; that the said resolution was approved by the Mayor of Lajas on February 27, 1928, and a copy thereof was forwarded to and received by the Public Service Commission.

That under date of May 22, 1928, the Governor of Puerto Rico wrote and forwarded to the president of the Public Service Commission of Puerto Rico a letter enclosing another letter from the Commissioner of the Interior of Puerto Rico; that a true copy of said letter from the Governor and of the enclosed letter from the Commissioner of the Interior are accompanied to this petition as a part thereof as "Exhibit D".

That said resolution (Exhibit C) and said letters (Exhibit D) were the only complaints filed with the Public Service Commission with regard to the cancellation of the above franchise and that the same constitute the original complaints on which the Public Service Commission rendered and entered the order appealed from, dated March 9, 1929.

Fourth. That subsequently, on or around the 27th of November, 1928, the appellants (with the exception of Edward S. Paine, who was not a member of Russell & Company, Sucrs., S. en C.), especially appeared before the [fol. 4] Public Service Commission of Puerto Rico and alleged want of jurisdiction on the part of the Public Service Commission to cancel the said franchise and presented a motion to dismiss the said proceedings for lack of jurisdiction. That a true copy of said special appearance and of the motion to dismiss the case is joined to this petition and made a part thereof as "Exhibit E". That at the time the said motion was presented a quorum of the members of the Public Service Commission was not present in the session room, and the president of said Commission requested from the appellants to file an answer to the order to show cause (Exhibit B) without admitting the jurisdiction of the Commission and without waiving their special appearance and

motion to dismiss, which latter motion would be considered and decided later by the Commission, and the appellants acquiesced to the said request, but the Public Service Commission has never passed on said motion.

Fifth. That without waiving their motion to dismiss and without accepting the jurisdiction of the Public Service Commission, the appellants (except Mr. Paine) on November 27, 1928, presented to the Public Service Commission an answer to the order to show cause of May 26, 1928 (Exhibit B), a faithful copy of which answer is joined to this petition and made a part thereof as "Exhibit F".

Sixth. That the Public Service Commission held several public hearings in case J2763, relative to the cancellation of the franchise, Exhibit A; that the complainants produced evidence to prove their complaints, as well as the order to show cause, dated May 26, 1928, and the appellants also adduced evidence in support of their answer and in opposition to the cancellation of said franchise. That the municipality of Guanica appeared besides as intervenor in opposition to such cancellation. That on March 9, 1929, the Public Service Commission rendered and entered an order canceling that part of the franchise mentioned, which refers to the use of certain waters from Guanica Lake for purposes of irrigation, and the said order was served on counsel for the appellants on March 9, 1929. This order is the one appealed from herein and from said order and from the re-
[fol. 5] port of the president of the Commission mentioned in said order, exact copies are joined to this petition, as a part thereof, marked "Exhibit G".

Seventh. That the Public Service Commission committed the following errors in rendering and entering the said order of March 9, 1929, as well as in the proceedings had in case J2763 wherein the said order appealed from was entered, to wit:

1. The Public Service Commission erred in ordering the cancellation of that part of franchise number 5 granted by the Executive Council of Puerto Rico to the Guanica Land Company, which refers to the use of certain waters from Guanica Lake for purposes of irrigation.

2. The Public Service Commission erred in holding that it has power or jurisdiction to totally or partially cancel

franchise number 5 granted to the Guanica Land Company on March 19, 1901, by the Executive Council of Puerto Rico.

3. The Public Service Commission erred in not holding that the Congress of the United States has the exclusive power, authority and jurisdiction to cancel or revoke Franchise Number 5, granted to the Guanica Land Company by the Executive Council of Puerto Rico on March 19, 1901.

4. The Public Service Commission erred in not holding that it lacks jurisdiction over these appellants because they are not, nor form a part, of any public service corporation or partnership.

5. The Public Service Commission erred in not holding that it lacked jurisdiction to consider this proceeding.

6. The Public Service Commission erred in not sustaining the motion of these appellants to dismiss the proceedings for the cancellation of franchise number 5, granted on March 19, 1901, to the Guanica Land Company by the Executive Council of Puerto Rico, as to these appellants.

7. The Public Service Commission erred in holding that there are sufficient grounds to justify the cancellation of that part of franchise number 5 of March 19, 1901, which refers to the use of certain waters of Guanica Lake for purposes of irrigation.

8. The Public Service Commission erred in holding that [fol. 6] the appellants have not complied with the obligations imposed by franchise number 5 of March 19, 1901.

9. The Public Service Commission erred in not holding that the power to cancel franchise number 5 of March 19, 1901, exists solely when there is a breach of obligations imposed by the franchise, of such a serious nature that the cancellation is necessary, and that such right does not depend on the whim of the Commission.

10. The Public Service Commission erred in not holding that the remedy of a suit for damages provided by Section IV of the franchise of March 19, 1901, is the sole remedy of the complainants or other person who has suffered damages by reason of the floods in the Lajas region.

11. The Public Service Commission erred in not demanding from the appellants the fulfilment of their obligations, in accordance with franchise number 5 of March 19, 1901, instead of canceling the same.

12. The Public Service Commission erred in holding that the floods in the valley of Lajas were caused by the acts or by the negligence of the appellants.

13. The Public Service Commission erred in not holding that the floods of the valley of Jajas and the high level of the waters of Guanica Lake were caused by torrential and extraordinary rains and by an act of God (vis major).

14. The Public Service Commission erred in holding that the works done by the appellants within the bed of Rio Loco, as well as other innovations made by them in the bed of the river, and the works made, have contributed to the flow of a greater volume of water in the Guanica Lake than that formerly flowing in.

15. The Public Service Commission erred in holding that Negros Pond was at any time completely closed up or eliminated.

16. The Public Service Commission erred in holding that the appellants have interest in keeping the level of Guanica Lake as high as possible.

17. The Public Service Commission erred in holding that the appellants have raised or kept the level of the waters of [fol. 7] Guanica Lake above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall.

18. The Public Service Commission erred in holding that in accordance with the terms of franchise number 5 of March 19, 1901, the appellants were bound to know and to keep a fixed level above which they should not have allowed the waters of Guanica Lake to raise, unless this was caused by extraordinary rains.

19. The Public Service Commission erred in holding that the appellants should be presumed to be responsible of the consequences ensuing from the high level of the waters of Guanica Lake, unless the appellants show the contrary in a conclusive manner to the Commission.

20. The Public Service Commission erred in holding that the Commission must presume that the high level of the waters of Guanica Lake and the floods in the valley of Lajas could not have occurred without the consent and knowledge of the appellants.

21. The Public Service Commission erred in taking into consideration for entering the order appealed from, the alleged fact that franchise number 5 of March 19, 1901, has caused difficulties to said Commission, as well as to the Insular Government.

22. The Public Service Commission erred in not holding and deciding that the steps taken by the appellants to lower the level of Guanica Lake and to keep said level are sufficient to maintain said waters at the customary level thereof during years of average and usual rainfall and sufficient besides to avoid further floods in the valley of Lajas.

23. The Public Service Commission erred in not making an ocular inspection in accordance with the motion presented by the Municipality of Guanica, before entering the order appealed from.

24. The Public Service Commission committed other errors in rendering the order appealed from as well as in the proceedings had in case J-2763 before the said Commission, such errors appearing from the face of said order and proceedings.

Eighth. That a sworn statement of the attorney for the appellants to the effect that this appeal is not taken with [fol. 8] the object of delaying this cause but because the said appellants and their counsel verily believe that grave injustice and error have been committed, is joined to this petition as a part thereof and marked "Exhibit H".

Ninth. That the order of the Public Service Commission of Puerto Rico dated March 9, 1929, appealed herein, is unreasonable, abusive, arbitrary and illegal and is founded on inadmissible evidence, and that said order is not in accord with the law; that the same constitutes a taking of the property of the appellants without due process of law, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and of the provisions of an act of the Congress of the United States of March 2,

1917; that said order constitutes besides a taking of the private property of the appellants for public purposes without just compensation, in violation of the Fifth Amendment of the Constitution of the United States and of the provisions of an act of the Congress of the United States of March 2, 1917; that the said order constitutes, furthermore, a violation of the provisions of an act of the Congress of the United States of April 12, 1900, and that the same should be reversed.

For the foregoing reasons the appellants pray that this appeal be admitted and allowed and that a final decree be entered reversing the order of the Public Service Commission of Puerto Rico, rendered and entered March 9, 1929, in case J2763 (Exhibit G), with costs, disbursements and attorneys' fees to the appellants herein.

San Juan, Puerto Rico, April 8, 1929.

O. B. Frazer, Attorney for the Appellants.

Duly sworn to by O. B. Frazer. Jurat omitted in printing.

[fol. 9] [File endorsement omitted.]

EXHIBIT "A" TO PETITION

A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for Purposes of Irrigation of its Lands, and also for the Construction of a Wharf in the Harbor of Guanica, and also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica.

The Executive Council of Puerto Rico does hereby ordain and enact:

I. That the Guanica Land Company (a corporation organized and existing under and by virtue of the laws of the State of New Jersey), and its successors and assigns, be and they are hereby authorized and empowered to erect, construct, maintain and operate a dam of masonry work or other proper materials across the Cano Negro, or outlet

from the Lake of Guanica, in the municipality of Yauco and upon such lands of abutting owners as may have been acquired by consent or by process of law, for the purpose of [fol. 10] retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said lake, through the said cano or otherwise, for the purposes hereinafter set forth.

II. That the said Company and its successors and assigns be and they hereby are authorized to take from the said Lake of Guanica, or from the said cano or outlet, such quantity of water not exceeding 20,000,000 gallons during each day, as shall be necessary or sufficient for the proper irrigation of the lands now or hereafter owned or leased by the said Company, or by its successors or assigns, or any of them. The water so to be taken from the said lake or cano may be taken from such part or parts thereof, adjacent or contiguous to said lands, as the said Company or its successors or assigns may see fit, and may be taken by gravity through proper channels, or by pumps, or by any other method that may be advisable, or by any two or more of such methods.

III. That the said company and its successors and assigns may erect, construct, operate and maintain upon those parts of the lands now or hereafter owned or leased by it or them, which lie within six meters of the bank of the said cano, or within twenty meters of the shore of the said lake or of the harbor or bay of Guanica, such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters; provided, that no public road lying within or partly within said limits shall be obstructed to any extent whatever thereby.

IV. That nothing herein contained shall be held or construed to authorize or permit the said Company or its successors or assigns to raise or maintain the level of the waters of said Lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said lake, or by unduly lowering the level of the waters of said lake, shall be borne by the said Company, its successors and assigns and action for damages shall lie [fol. 11] against said Company, its successors and assigns

for such damage by such abutting owners, in any court of competent jurisdiction.

V. That the Guanica Land Company and its successors and assigns be and they hereby are authorized and empowered to construct, maintain and operate a line of standard gauge railway of one meter in width, with proper sidings, switches and other appurtenances, upon and along those parts of the lands now or hereafter owned or leased by it or them, which lie within six meters of the bank of the said Cano Negro, or within twenty meters of the shore of the Lake of Guanica or of the Harbor or Bay of Guanica.

VI. That the railway so to be constructed and operated shall be well substantially built and shall be used for the transportation of the cattle, crops, and other goods and effects owned by the said company, or its successors or assigns and of its and their agents and employees; provided, that nothing herein in this clause contained shall be held or construed to give said Company, its successors or assigns the right to transport the crops, goods and effects of any other person, firm or corporation for hire.

VII. That no part of any public road or way lying within or partly within the limits aforesaid shall be occupied or obstructed by the said railway, except in so far as may be required to allow the same to cross and recross such road or way where necessary; all such crossing shall be at all times maintained by the said company and its successors and assigns, under such condition as may be satisfactory to the Commissioner of the Interior, and in case said Company shall fail or refuse to follow the instructions of said Commissioner in respect to such crossings, said crossing or any of them, whether now existing or hereafter created may be put by the Commissioner of the Interior in such condition as he may find satisfactory and the cost thereof shall become and be a first lien upon the property and assets of said Company, to be enforced in a court of competent jurisdiction as other liens may be enforced.

VIII. That the said Guanica Land Company and its suc-
[fol. 12] cessors and assigns be and they hereby are authorized and empowered, the consent of the United States, through its Secretary of War having been first obtained, to erect, construct, maintain and operate a dock or wharf in

the harbor or bay of Guanica upon lands now or hereafter owned, leased or controlled by it or them, and upon lands under water adjacent thereto, with such approaches as may be satisfactory to the Commissioner of the Interior.

IX. That the wharf or dock so to be constructed and maintained shall be well and substantially built, and shall be of sufficient size and length to allow of its use by steamers and vessels for the purpose of receiving and discharging the goods, chattels and effects of the said Company and its successors and assigns, and for the debarkation and embarkation of its or their officers, agents and employees; nothing, however, in this section contained, shall be held or construed to give said company, its successors or assigns the right to permit the use of said wharf or dock by steamers or vessels of any other person, firm or corporation whatever, for hire or otherwise, for any purpose, and especially for the purpose of receiving or discharging goods, chattels and effects of any other person, firm or corporation, nor shall such section be held or construed to give said company, its successors or assigns, the right for hire or otherwise, to receive or discharge in its own vessels or the vessels of any other person, firm or corporation, goods, chattels and effects belonging to any other person, firm or corporation.

X. That if the said wharf or dock shall extend to or cross any public road or way along the shores of the said harbor of Guanica, the said Company, its successors and assigns shall at all times construct and maintain such approaches on either side thereof as shall be satisfactory to the Commissioner of the Interior, and at any time hereafter the said Commissioner may direct alterations or repairs or changes in said approaches, which shall be made by said Company, its successors and assigns; and in the event of the failure of the said Company, its successors or assigns to make such changes, repairs or alterations within a reasonable time, the same may be made by the Commissioner of [fol. 13] the Interior, and the cost therof shall be charged against said Company, its successors and assigns as a first lien upon all of its property and assets, said lien to be enforced by process of law as other liens are enforced.

XI. That the said Company and its successors and assigns are hereby authorized to construct and maintain such

other works as may be necessary for the proper operation of the said dam, channel, pipe lines, pumping stations, railway and wharf or dock or any of them.

XII. That the said Guanica Land Company and its successors and assigns shall at all times allow without compensation the use of the said railway and wharf to the Federal and Insular Government for the transportation and embarkation of their troops and employees and military and other stores; provided, that the free use of the said railway and wharf by the said Company and its successors and assigns shall not be obstructed or impeded thereby, except in time of war.

XIII. The Guanica Land Company and its successors and assigns are hereby authorized, subject to the approval of the Commissioner of the Interior, to enter upon and occupy so much of the public and private lands as may be reasonably necessary for the purpose of making surveys, determining and laying out routes of lines, and performing all other acts necessary in connection with the exercise of the powers herein granted, and each and all of them, and shall have power to acquire by eminent domain such private lands as may be required for the works authorized herein, as now or hereafter determined upon, in the manner now or hereafter provided by the laws applicable in such cases.

XIV. Before any of the work herein authorized shall be begun, the plans for the same shall be submitted to and approved by the Commissioner of the Interior for the Island of Porto Rico, and all material and construction shall be subject to inspection by him and his agents. After such plans shall have been approved by the said Commissioner no material change or modification shall be made therein, unless the same shall be authorized or directed or [fol. 14] approved by the Executive Council, or by the said Commissioner or his agents.

XV. Acceptance of the franchise, privileges, concessions and rights granted herein and hereby shall be made by the Guanica Land Company, or by its successors or assigns by filing with the said Executive Council a written acceptance within ninety days after the approval hereof by the Governor of Porto Rico, and work shall be begun within

sixty days from such written acceptance, and be completed within one year thereafter.

XVI. In addition to the general taxes at any time laid or imposed upon the said Guanica Land Company or its successors and assigns, it and they shall pay to the Treasurer of Porto Rico, as consideration herefor, the sum of three hundred dollars annually, the first payment to be made at the time of filing the acceptance hereof as hereinbefore provided, and each further payment to be made at the expiration of each succeeding year thereafter; provided, that upon the failure of the said company, its successors or assigns, for a period of thirty days, to make the payment herein provided, the Commissioner of the Interior is authorized to stop the flow of water from said lake through the canal and other channels of said company, or to take such other steps as in his sole discretion, or in the discretion of the Executive Council, may be necessary to enforce the payment of said annual sum of three hundred dollars.

XVII. The franchises, concessions, rights and privileges hereby granted, or any one or more of them, may be assigned and transferred in whole or in part by the said Guanica Land Company, and by its successors and assigns, and it and they may grant license in respect thereto, every such assignee and licensee, unless otherwise provided by the instrument of assignment or grant, shall succeed to and acquire all the rights, liberties, privileges, power and authority herein granted or conferred upon the said Company, and shall also be bound by and obligated to the observation and performance of all terms, conditions, agreements and stipulations herein contained, so far as the same are applicable to such assignment or grant.

[fol. 15] XVIII. In accordance with Section 3 of Public Resolution No. 23, approved May 1st, 1900, it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal; and that issue of stock or bonds, except in exchange for actual cash, or property at a fair valuation equal in amount to the par value of the stock or bonds issued, and the declaration of stock or bond dividends, are forbidden.

XIX. The franchise, privileges, rights, concessions and authority herein granted, are granted for the term of ninety-nine years, beginning from the date of the acceptance hereof as hereinbefore provided.

XX. The franchise, privileges, concessions and authority hereby granted, are granted in accordance with and subject to the provisions of the existing laws now in force in Porto Rico and all terms hereof shall be construed in accordance therewith.

XXI. Nothing herein in this grant contained shall be construed to give the said Company, or its successors, or to the asisgns in whole or in part of any of the rights and privileges herein granted, the right, directly or indirectly, with or without compensation in money or otherwise, to use, hire, lease, sell or otherwise dispose of the waters of said lake or any part thereof for the purpose of irrigating any lands other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold.

XXII. The Executive Council hereby reserves the right at any time after the date of this grant to declare the said Company, its successors and assigns, a common carrier with respect to said railroad and wharf, and to extend the use of said railroad and wharf, to the general public upon such terms and conditions as to rates and tariffs as the Executive Council may from time to time establish.

[fol. 16] Done in open session of the Executive Council on this the nineteenth day of March, 1901.

William H. Hunt, President of the Executive Council. Approved: Chas. H. Allen, Governor of Porto Rico.

EXHIBIT "B" TO PETITION

In the Public Service Commission of Puerto Rico

Case Number J2763

In re Cancellation of Franchise Number 5, Entitled "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for Purposes of Irrigation of Its Lands, and Also for the Construction of a Wharf in the Harbor of Guanica, and also for the Construction and Operation of a private Railway Along Certain Portions of the Harbor of Guanica

Order to Show Cause

The Public Service Commission to Russell & Company, Sucrs., S. en C., Ensenada Estates, Inc., and its assignees, Guanica Central, and its assignees, and to any other person or legal entity which may have acquired any rights, by grant or purchase, of the above entitled franchise:

Please take notice that you, Russell & Company, S. en C., a limited partnership constituted in accordance with the laws of Puerto Rico, with its principal office at Number 11 Leon Street, in the city of Ponce, Puerto Rico; Ensenada Estates, Inc., a corporation constituted under the laws of the State of Connecticut, or its assignees; Guanica Central, a corporation organized under the laws of the State of New Jersey, or its assignees; and any other person having any interest, by grant or purchase, in the aforegoing franchise, are hereby ordered to appear before the Public Service Commission of Puerto Rico, in the session room thereof, [fol. 17] at Number 1 Allen Street, San Juan, Puerto Rico, on the 4th day of June, 1928, at 2:30 P. M., to show cause, if any you may have, and to state the reasons why this Public Service Commission should not totally cancel the franchise entitled "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica," granted by the Executive Council of Puerto Rico on March 19, 1901.

The grounds for the nullity affecting the validity of said franchise are as follows:

I. That the present holder of this franchise, which acquired the same by assignment made thereto by the Ensenada Estates, Inc., is at present enjoying the benefits, rights and grants to which the franchise herein involved refers, the assignment or grant by virtue of which it apparently acquired said rights never having been approved by the Public Service Commission of Puerto Rico.

That the franchise was originally granted on March 19, 1901, by the Executive Council of Puerto Rico to the Guanica Land Company and the latter assigned it to the Guanica Central, the said assignment having been approved by the Executive Council of Puerto Rico on the 31st of October, 1901.

That said corporation Guanica Central was extinguished on June 30, 1917, and that it does not appear from the files of this Commission, nor from those of the Executive Council of Puerto Rico, that before the date mentioned, nor subsequent thereto, any grant of assignment of the franchise in question was ever approved or authorized.

That under date of July 18, 1917, the Ensenada Estates, Inc., appeared and prayed from this Public Service Commission that the assignment of the franchise in question in favor of the limited partnership Russell & Company be approved, and that the approval of this assignment was denied by this Commission on January 13, 1918.

[fol. 18] II. That neither the Guanica Land Company, original holder of this franchise, nor the Guanica Central, nor Ensenada Estates, Inc., nor Russell & Company, Sucrs., S. en C., nor any other person, have complied with the provisions of section 14 of the franchise in question, inasmuch as no detailed plans have been submitted to the approval of the Commissioner of the Interior of Puerto Rico of the works to be done in accordance with said franchise, or of the alterations or changes to be made thereon subsequently.

III. That the holder of the franchise has allowed on different occasions, as for example in the year 1914 and in the year 1922, and specifically from and after the month of July, 1926, to the present, that the level of the waters of Guanica Lake be kept at a height greatly in excess of the customary level of the waters of said lake during the rainy

season in extraordinary years; all of this in violation of the provisions of section 4 of the franchise in question.

That this excess of water in the Guanica Lake over and above the normal level during the rainy season has flooded, with an average of two or three feet of water, a zone of land whose area varies between five and six thousand cuerdas in the Municipality of Lajas, causing grave injury and damages, individually, to the owners of the land so flooded, as well as to the community in general.

That the flood just mentioned above has extended over the neighboring roads of the Municipality of Lajas known as "Fabiani" and "Don Mariano", for an approximate length of seven to eight kilometers, having besides cut off partially the station of the American Railroad Company of Puerto Rico in the ward of La Plata.

IV. That the grants, privileges and rights enjoyed by virtue of this franchise are:

(a) The use of water for purposes of irrigation in private lands;

(b) The construction of a private wharf in the harbor of Guanica; and

[fol. 19] (c) The construction and operation of a private railway in Guanica.

That said grants, privileges and rights are of a purely private and personal character and that from the wording of the said franchise it does not appear that at any time a service of a public nature is ever rendered; and even if no express or implied violation of the terms of this franchise has been committed by the present or former holders thereof, the consequences ensuing from the enjoyment of the rights granted by the franchise have occasioned grave and considerable injury to a great number of persons in their private properties, as well as to the public in general, without any compensation therefor.

And that there is no legal nor moral reason justifying the continuation of the enjoyment of the rights and privileges comprised under the franchise herein discussed, with the sole object of giving a private service, to the grave injury of the public interest of a community.

All of the preceding reasons constitute, in the opinion of this Public Service Commission, sufficient ground to justify the final cancellation of the franchise mentioned in the body of this order; and this Commission will do so without further summons or hearing, if you fail to appear at the place, date and hour stipulated in this order.

It was so ordered by the Public Service Commission of Puerto Rico.

San Juan, Puerto Rico, May 26, 1928.

By Miguel A. Munoz, President.

EXHIBIT "C" TO PETITION

Municipal Government of Lajas, Puerto Rico

Office of the Secretary

Resolution

Complaining Before the Public Service Commission and Before the Commissioner of the Interior of Puerto Rico of the Damages and Difficulties Caused by the Flow-Back and by the Overflow of the Waters of the Dam of Guanica Lake.

[fol. 20] Whereas the government of Lajas has received a complaint signed by a number of real estate owners and residents of the ward of Costa of this municipality, wherein they complain of the difficulties created by the flow-back and overflow of the waters of Guanica Lake, which from and after the year 1926 have cut off and interrupted the communication between two of the principal roads of this jurisdiction, these waters extending at present over the most fertile portion of said ward, thus preventing the cultivation and exploitation of the lands and threatening the public health with the diseases which by reason of this anomalous situation have arisen and have made life inconvenient by reason of the mosquito plagues which have developed in said region;

Whereas the said Guanica Lake has always had as outlet the Negro Pond, which connects it with the sea, and according to information received by this Municipal Assembly, this situation is due to the fact that at the mouth of Negro

Pond of the Guanica Lake tree-trunks and walls of ground have been raised, which prevent the flow of water from the lake and have forced and raised the level of the waters to points and heights which they never reached before, and the same had never affected the conditions of this community like they are affecting it at present, nor caused any disease and loss of property, nor any complaints like the one now brought before this municipal body had been filed before;

Whereas this Municipal Assembly has been informed that the works which prevent the outlet of the Guanica Lake and caused the flow-back of the waters have been carried out under the authority of the Executive Council of Puerto Rico or under a franchise of the Public Service Commission, and it is known by this Assembly that the flood or invasion of these waters has cut off the station of the American Railroad Company in the ward of La Plata from the ward of Costa, through roads numbers 9 and 10 of this municipality, which are known as Fabiani and don Mariano roads, and it is of general knowledge in this municipality that at present, and from and after the year 1926, these roads can not be used, and it is necessary to evade them [fol. 21] by going around the town of Lajas in order to reach the said railroad station, and all of this cause material injury to this municipality; and

Whereas it is the unavoidable duty of this municipal organism to protect the health and welfare of its citizens and taxpayers; and in order to procure the health of its people it should always act in such a manner that the community be always safeguarded and defended according to law;

Therefore, be it resolved by the Municipal Assembly of Lajas, Puerto Rico:

I. To complain before the Public Service Commission of Puerto Rico and before the Commissioner of the Interior of Puerto Rico that the engineering works carried out on Negro Pond of Guanica Lake are causing irreparable damages to the Municipality of Lajas, by throwing the waters of Guanica Lake beyond their highest level; by invading, as they have, municipal roads numbers 9 and 10 of this jurisdiction, and by making the life of the residents and real estate owners of the wards of Costa and Plata impossible, and in order that an investigation of the case be made by the proper party so as to protect the interest of one of the

richest regions of Puerto Rico and the health and life of this community.

II. To send a certified copy of this resolution to the Hon. Public Service Commission of Puerto Rico, another copy to the Hon. Governor of Puerto Rico and a third one to the Commissioner of the Interior for their information and control.

III. This resolution being of an urgent nature will become effective immediately after its approval by the Hon. Mayor, and repeals and annuls any other resolution, ordinance or proclamation contrary thereto.

I hereby certify that the foregoing resolution was adopted by the Municipal Assembly of Lajas, Puerto Rico, in a special session held on the 24th of February, 1928, and that the same was approved by the Mayor on the 27th of the said month and year.

Juan J. Flores, Municipal Secretary.

[fol. 22] I, L. F. de Vizcarrondo, Secretary of the Public Service Commission of Puerto Rico, do hereby certify:

That the foregoing resolution is a true and faithful copy of a certified copy thereof appearing of record in case No. J2763, entitled "Resolution complaining before the Public Service Commission and before the Commissioner of the Interior of Puerto Rico of the damages and difficulties caused by the flow-back and by the overflow of the waters of the dam of Guanica Lake," approved by the Municipal Assembly of Lajas the 24th of February, 1928, and by the Mayor on the 27th of said month and year.

In witness whereof, and at the request of O. B. Frazer, Esq., I issue these presents under my hand and the official seal of the Commission, in San Juan, Puerto Rico, this 6th day of April, 1929.

L. F. de Vizcarrondo, Secretary.

[The official seal of the Commission is affixed herein.]

EXHIBIT "D" TO PETITION

Government House, Porto Rico

San Juan, Puerto Rico, May 22nd, 1928.

Honorable Miguel Munoz, President Public Service Commission, San Juan, Porto Rico.

SIR:

I am sending you herewith a letter from Mr. Esteves, Commissioner of the Interior, with the accompanying file, regarding flood conditions in the southwestern part of Porto Rico, occasioned, it is claimed, by the violations of a public franchise granted to the Guanica Land Company in 1901. It is recommended that you take action to hold a Public Hearing as to the advisibility of repealing said franchise and to take such other action as may be necessary in the interest of the People of Porto Rico. As the conditions are considered serious and delay may bring further and grave injury, it is urged that this hearing be called at the earliest possible date.

[fol. 23] I approve the suggestion, and hope that such hearing may be ordered at no distant date.

Respectfully yours, H. M. Towner, Governor.

Certificate

I, L. F. de Vizcarrondo, Secretary of the Public Service Commission of Puerto Rico, do hereby certify:

That the foregoing is a true and faithful copy of the original letter, appearing of record in case No. J-2763, dated May 22, 1928, addressed by the Honorable Governor of Puerto Rico to the President of the Public Service Commission in connection with the flood of the valley of Lajas, wherein the former official suggests the calling of a public hearing at the earliest possible date.

In testimony whereof and at the request of O. B. Frazer, Esq., I issue these presents under my hand and the official seal of the Commission, in San Juan, Puerto Rico, this sixth day of April, 1929.

L. F. de Vizcarrondo, Secretary.

[The official seal of the Commission is affixed.]

Government of Porto Rico,

Department of the Interior

May 22, 1928.

The Honorable The Governor of P. R., San Juan:

SIR:

I have the honor to inform you that the Department of the Interior, upon petition from the Municipal Council of Lajas, investigated the causes of the actual flood of Lajas Valley, and according to preliminary report about the matter, presented to me by the Assistant Superintendent of Public Works, this special situation has been apparently created by the violation by the Guanica Land Company of some of the provisions of the franchise granted to them on the 19th of March, 1901, a copy of which accompanies this report. Allow me to call your attention especially to sections 1, 2, 3, 4, 7 and 14.

[fol. 24] I wish to state that according to the records of our files, the Guanica Land Company never submitted plans of the works to be done across "Cano Negro."

There is no record that the customary level of Guanica Lake during rainy seasons at the time the franchise was granted, was ever determined.

From the investigation we have been able to ascertain that several municipal roads of the municipalities of Lajas and Guanica, since 1926 are flooded, and that considerable amount of private lands are at present well under water, and to our knowledge none of the damages sustained by abutting owners have been borne by said Guanica Company.

I beg to submit to your consideration a clipping from daily paper "El Mundo," edition of Saturday, May 19th; according to reports from the Superintendent of Public Works, conditions are as serious as described in said clipping.

From the report under my consideration, I am inclined to believe there is sufficient cause to urgently request the Public Service Commission to call a Public Hearing to determine the conveniency of repealing said franchise, provisions of which have been violated, causing constantly considerable damage to both public and private property.

I could present the matter directly to the Public Service Commission if you so desire.

Respectfully yours, Guillermo Esteves, Commissioner.

Certificate

I, L. F. de Vizcarrondo, Secretary of the Public Service Commission of Puerto Rico, do hereby certify:

That the foregoing is a true and faithful copy of the letter which under date of May 22, 1928, the Hon. Commissioner of the Interior addressed to the Honorable Governor of Puerto Rico in connection with an investigation practiced by the Assistant Superintendent of Public Works of the said Department, with regard to the causes that have given [fol. 25] rise to the flood of Lajas Valley, the original of which letter appear- of record in case No. J-2763 of this Commission.

In testimony whereof and at the request of O. B. Frazer, Esq., I issue these presents under my hand and the official seal of the Commission, this 6th day of April, 1929, in San Juan, Puerto Rico.

L. F. de Vizcarrondo, Secretary.

[The Official Seal of the Commission is affixed.]

Exhibit "E" to Petition

In the Public Service Commission of Puerto Rico

Case No. J2763

In re Cancellation of Franchise Number 5, Entitled "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for Purposes of Irrigation of Its Lands, and Also for the Construction of a Wharf in the Harbor of Guanica, and Also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica"

Special Appearance and Motion to Dismiss the Case

Now come the South Porto Rico Sugar Company, a domestic corporation of Puerto Rico, and Russell & Company,

Sucrs., S. en C., a civil agricultural partnership composed of Horace Havemeyer, Frank M. Welty, Frank A. Dillingham, Edwin L. Arnold and H. B. Orde, as partners, and appearing especially with the sole object of impeaching the jurisdiction of this Hon. Public Service Commission, allege:

1. That the Public Service Commission lacks jurisdiction over this case and that it does not have jurisdiction to cancel the franchise mentioned in the order to show cause issued by the Commission on May 26, 1928.

2. That none of the parties appearing in this cause is a public service corporation or a public service partnership, or is engaged in any manner in public service, and that this Commission does not have jurisdiction over these parties or over any one of them.

[fol. 26] Wherefore petitioners pray that this case be dismissed and filed away and that the order to show cause be equally dismissed.

O. B. Frazer, Attorney for the South Porto Rico Sugar Company, and for Russell & Company S. en C.

EXHIBIT "F" TO PETITION

In the Public Service Commission of Puerto Rico

Case No. J-2763

In re Cancellation of Franchise No. 5, Entitled "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for the Purposes of Irrigation of Its Lands, and Also for the Construction of a Wharf in the Harbor of Guanica, and Also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica"

Answer of Russell & Company, Sucrs., S. en C., to the Order to Show Cause

Now comes Russell & Company, Sucrs., S. en C., a civil agricultural partnership organized in accordance with the laws of Puerto Rico, composed of Horace Havemeyer, Frank A. Dillingham, Frank M. Welty, Edwin L. Arnold and H. B. Orde, as partners, and as their answer to the

order to show cause issued by this Hon. Commission on May 26, 1928, alleges as follows:

1. That on or about the 15th day of March, 1917, the corporation Guanica Centrale, which at the time was the owner of the franchise to which the order to show cause herein refers, assigned and granted for value received to the Corporation Ensenada Estates, Inc., a corporation of the State of Connecticut, all of that part of said franchise and of the rights therein contained, referring to the use of certain waters of Guanica Lake for purposes of irrigation, that is, to be more specific, the rights contained under Paragraphs I and IV, inclusive, of said franchise; and that subsequently, v. g., on or about the 29th day of June, 1917, the said corporation Ensenada Estates assigned and granted for value [fol. 27] received to the partnership appearing herein, the above mentioned part of said franchise, and that this partnership is at present the owner of all that part of said franchise having to do with the use of water for purposes of irrigation; that the said assignments or grants were communicated to the Executive Council of Puerto Rico and to the Public Service Commission, and although it is true that they were not approved by said Council and Commission, such approval was unnecessary for their validity inasmuch as the franchise itself authorizes its assignment or grant.

II. Answering Paragraph "II" of the order to show cause, this partnership alleges that neither this partnership nor the former owners of that part of the franchise which refers to the use of certain waters has not carried out any works in connection with the taking of water for the use to which said paragraph refers, and that inasmuch as it has not done the said works, it was not necessary or possible to submit plans to the Commissioner of the Interior.

III. Answering Paragraph "III" of the order to show cause this partnership admits that on the dates mentioned the level of the waters of the Guanica Lake has been higher than the usual level and that some lands and roads have been flooded, but it does not know the extent of such flood; but this partnership alleges that the said flood and high level of the waters of Guanica Lake were not caused by any act, blame or negligence of this partnership or of the former owners of the franchise, but solely by acts of nature beyond the control of this partnership. It goes on alleging that if

any person has suffered damages for the reasons stated in the order to show cause, the only remedy of such person is the remedy by suit granted by the franchise itself, and that said reasons do not justify at any time the cancellation of the franchise.

IV. Answering Paragraph "IV" of the order to show cause, this partnership alleges that the Executive Council had sufficient power and authority to grant the said franchise, and that the same is entirely valid and legal; that [fol. 28] this partnership and the former owners of the franchise have always complied with the provisions thereof; that acting in good faith and in acordance with the provisions of said franchise, this partnership and the former owners of the franchise have spent great sums of money in pipes, pumps, canals and other works for taking and using the water of Guanica Lake, and that the cancellation of said franchise would cause to this partnership a great loss of money and property; that the said cancellation would be equivalent to the taking of the property of this partnership without due process of law and besides a taking of the private property of this partnership for public purposes without just compensation and will be contrary to the fifth and fourteenth amendments of the Constitution of the United States and to the Organic Act of Puerto Rico, approved by Congress March 2, 1917, and to the acts and statutes of Puerto Rico and of the United States.

As a second and distinct defense and as an answer to the order to show cause, this partnership alleges:

V. That this Hon. Public Service Commission does not have jurisdiction over this partnership.

As a third and distinct defense and as an answer to the order to show cause, this partnership alleges:

VI. That although this partnership had no obligation whatsoever to do so, it has taken the necessary and proper steps to lower the height of the waters of Guanica Lake to its customary level and to guarantee that in the future the waters will not go beyond the customary level, and that this partnership has paid all the expenses of said works out of its own money.

Wherefore the petitioner prays that the order to show cause be dismissed and that this case be filed away.

San Juan, Puerto Rico, November 27, 1928.

O. B. Frazer, Attorney for Russell & Company, Sucrs., S. en C.

THE PEOPLE OF PUERTO RICO,
District of San Juan, ss.:

O. B. Frazer, being duly sworn, deposes and says that he [fol. 29] is the attorney for Russell & Company Sucrs. S. en C., that he has read the foregoing answer; that to his best knowledge the same is true and that the reason why this verification is made by the deponent and not by said partnership is that none of the members thereof is within the Island of Puerto Rico.

O. B. Frazer.

Sworn to and subscribed before me, this 27th day of November, 1928, by O. B. Frazer, of full age, married, attorney-at-law and a resident of San Juan, Puerto Rico, to me personally known.

Luis Tirado Geigel, Notary Public.

Affidavit No. 441.

EXHIBIT "G" TO PETITION

In the Public Service Commission of Puerto Rico

Case No. J-2763

In re RUSSELL & COMPANY, Sucrs., S. en C., et al.

Order

For the reasons stated in the report of the President of this Commission, dated March 7th, 1929, and for the conclusions reached therein—the said report being hereby approved and made a part of this order—the Commission, after carefully studying the record of this case and fully considering the matter,

Orders the cancellation—as it hereby cancels—of that part of the franchise number 5 which refers to the use of

certain waters of Guanica Lake for purposes of irrigation, granted by the former Executive Council of Puerto Rico on March 19, 1901, entitled "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica";

Provided that this cancellation shall become effective June 30, 1929. It is understood, furthermore, that in the meantime the parties in interest are at liberty to file any [fol. 30] further petition which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the lake, as well as the plans of any other works, in order that this level may be permanently kept.

This order was rendered with the unanimous vote of the commissioners.

Let the parties be notified.

San Juan, Puerto Rico, March 8, 1929.

Miguel A. Munoz, President of the Commission.
Attest: L. F. de Vizcarrondo, Secretary.

In the Public Service Commission of Puerto Rico

Case No. J-2763

In re Cancellation of Franchise No. 5, entitled "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters or the Purposes of Irrigation of Its Lands, and also for the Construction of a Wharf in the Harbor of Guanica, and also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica."

Report

On February 24, 1928, a special session was held by the Municipal Assembly of Lajas in order to complain of the overflow of the waters of Guanica Lake, it being alleged that said waters had made unfit for traffic certain parts of municipal roads; and as it besides caused the existence of mosquito plagues which made life impossible in said region

by reason of the annoyance and diseases which they caused, this resolution was forwarded to the Public Service Commission.

The case was submitted by the Commission through a letter dated March 10, 1928, to the Attorney General, in order that this officer might take whatever steps he might deem proper. This letter was returned by the Acting Attorney General on the 13th of March, alleging as a reason there-[fol. 31] for that our endorsement did not request any action on the part of the Department of Justice.

On May 22, 1928, Governor Towner transmitted to the undersigned president a communication of the Department of the Interior describing the situation in Lajas Valley and recommending an investigation of the matter and the adoption of the necessary measures to defend and safeguard the interests of the public and of the People of Puerto Rico; urgent action was requested.

By virtue of this request of the Hon. Governor, the undersigned president appeared in the city hall of Lajas with the object of making a preliminary investigation with regard to the situation of the Lajas Valley, and after listening to a number of witnesses, appeared with his report before the Public Service Commission and this latter body, under date of May 26, 1928, issued an order to show cause directed against the holders of franchise number 5 or against any one who might be enjoying the rights granted by said franchise, and ordering them to appear and explain the reasons and grounds whereby the said franchise should not be canceled. This order averred:

1. That from the official records of this Commission it appears that several of the assignments which had been made of this franchise were never approved by the Commission.

2. That neither the original holder of this franchise nor any other person has complied with the duties imposed by same as regards the forwarding of plans or sketches of the works to be done, or of the alterations or changes to be made thereon.

3. That the holders or beneficiaries of this franchise, in the year 1914 and in 1922, and especially from and after the month of July, 1926, and up to the present, have allowed the level of the waters of Guanica Lake to be kept much

higher than the customary level of the waters of said lake during the rainy season in years of average and usual rainfall and that this causes grave injury in view of the fact that an area of five or six thousand acres of land has been flooded with an average depth of two or three feet of water.

4. That this franchise contains several grants, to wit: [fol. 32] One for the use of water for purposes of irrigation of private lands; another for the construction of a private wharf in the harbor of Guanica; and a third one for the construction and operation of a private railway in Guanica. That all these grants, as said before, have a private character, and that with the use of same, in case there has been an express or implied violation of the terms of the franchise, the consequences and results brought about by the exercise of the rights granted, have caused considerable damages and grave injury to the private property of a great number of persons, as well as to the public in general.

This was the order that was notified to the respondent on May 26, 1928. The hearing of this order was set for June 4th, 1928, and prior to the hearing thereof the respondents appeared before the United States District Court for the District of Puerto Rico requesting the issuance of a writ of injunction to refrain the Commission from holding a hearing, alleging, among other things, that this Commission lacked authority to amend or cancel the franchise which the Executive Council had granted. The restraining order was issued and once the final hearing of the case was held, the Federal Court dismissed the petition filed by the respondents. Feeling aggrieved by this order they appealed to the United States Circuit Court of Appeals for the First Circuit and in the meantime the Public Service Commission, as it understood that this was an urgent case, set the hearing of the case anew; but before the hearing could be held, the respondents obtained a new restraining order against this Commission, issued as a supersedeas by the Circuit Court of Appeals. On the 10th of November, 1928, we were advised that the said Court of Appeals had dismissed the appeal of Guanica Central and we set once more the hearing which had been pending since May, for November 27, 1928.

Finally, on that day the parties appeared and after raising some questions of law which were decided as the record shows, we went on to hear the testimony of the witnesses. The case could not be finished at a single session and had [fol. 33] to be postponed at the request of the Attorney General, who alleged that he needed some additional documents, and under the circumstances, additional settings were made till all the evidence was finally adduced during the 18th, 19th and 20th of February, 1929.

The undersigned president is in a position to assure that besides the information that he obtained through the testimony of the numerous witnesses who testified before this Commission, he was also in a position to personally notice Guanica Lake on different occasions, as well as the flooded region. It is estimated that this zone under water, according to the testimony of witnesses and to the observation we made, covered an area which varied between four and five thousand acres of land, and as appears from the photographs presented herein, we were able to confirm that numerous trees, as well as roads for eight or ten kilometers, farms in their entirety, where we could notice only the top of the posts of the barbed wire fences, were covered with water for a depth of two to three feet. This was around the month of May when I went there to hold the hearing. Again I visited the flooded region early in the month of January of this year and still there was under water a great portion of land which was estimated by Messrs. Maxwell and Page, of the respondents, as well as by one of the complainants, to have an approximate area of two thousand acres. It is true that in the meantime we had the cyclone of San Felipe of September 13, 1928, and that there was an extraordinary rainy season.

From the evidence adduced before this Commission it appears that since the month of July, 1926, a great flood began suddenly which covered all of the area known as "El Anegado" (overflowed region), on the area that we have already indicated, the water having been kept approximately with that same level since that date, that is, since the middle of the year 1926, during all of the year 1927 till late in the year 1928. The difference in the area of the flooded region has not been noticeable till early in the year 1929. There are within this flooded region around twenty-five or thirty different owners of rural properties who have their

lands flooded, some in their entirety and others partially, [fol. 34] and who are deprived, of course, of the right they have of using their lands as they may deem most convenient.

It appears furthermore that there are municipal roads that for seven or eight kilometers have been absolutely cut off to traffic during all this length of time, except by boat.

The question arises immediately: What is the cause of this situation? The complainants allege that the same is due to the fact that the outlet of the old Guanica Lake is obstructed and that when it receives the rain waters that run to said body, as well as the waters of the Loco River, the level of the lake goes up, gets flooded and the waters go back towards Lajas, thus covering the valley to the extent which we have indicated. On the contrary, the respondents allege that these floods are due to the existence of extraordinary rains and that the basins of the Lajas valley, tributaries of this lake, have been filled with a greater volume of water than is customary, and that this has brought about this situation.

In my opinion we should not lay great stress to the attempt made to show that Loco River was made to change its old bed and made to flow in the lagoon. The conflict in the evidence on this point is such that it seems to me that we may say that even before the Guanica Central had this franchise, Loco River ran over the same place that it runs at present, that is, that it flowed in the lake, at least partially, but there is no doubt, and it was so admitted by the respondents, that they have done said works within the bed of the river in order to prevent its waters from overflowing and also that this, with all the other improvements made by them in the bed of the river and with the works that appear to have been carried out, will undoubtedly contribute to the flowing of a greater volume of water into the lake than that which flower formerly.

In any event, this case does not depend on this question nor should the same be taken into consideration at the time of its decision. Here the basic, primary and important question is that the Executive Council granted a franchise to the Guanica Land Company by virtue whereof this com- [fol. 35] pany was authorized to take a certain quantity of water, not to exceed twenty million gallons per day, for purposes of irrigation, and that by virtue of clause four of

the said franchise the following obligations were imposed on the grantees:

"That nothing herein contained shall be held or construed to authorize or permit the said company or its successors or assigns to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof, during the rainy season, as the same exists in years of average and usual rainfall."

It is true that from the records of this Commission, as well as from the records of the Department of the Interior it appears that at no time the Government, or its representatives, fixed the level at which the waters of this lake should have been kept; and it is true also that the company did neither submit any data or report with regard to the level at which it was bound to keep these waters. From Mr. Page's testimony—who testified that he was field superintendent of Russell & Company, S. en C., the assignee of this franchise—it plainly appears that these companies were never interested in knowing the level at which they should keep these waters, with the object of not causing any damages to third parties. Mr. Page himself testified under oath that for the last ten or twelve years he had been in charge of the field work of all the lands; that he was the person responsible of the supervision of said works and that he did not know, nor had ever known, the level which they should not allow the waters of the lake to exceed, and that nothing to this respect was ever communicated to him by the company. If together with the testimony of Mr. Page, a high official of the respondent, we take the testimony given us by the engineer of the Department of the Interior, Mr. H. Blanco, it will not be hard for us to reach a conclusion.

It should be remembered that Mr. Blanco testified that he had made a thorough investigation of the whole situation created by this flood and that he was there personally for about two months collecting data and making daily observa- [fol. 36] tions, and that from his own observation he was able to say that the former outlet of Guanica Lake was "Los Negros" pond and that this outlet was absolutely interrupted for about three hundred meters, close to the lake, and that after this distance the bed of the old pond could be seen; but that for about three hundred meters, close to the

lagoon, as has been already said, the land was absolutely flat and no one could notice in that place that there had ever been a pond there. These lands were under the control of the respondents and it was in their own interests to keep the level of the lake as high as possible in order to have a sufficient amount of water so as to plant as large an area of sugar cane as possible. And if we add to this the fact that it was shown before this Commission, with credible and convincing evidence, like the testimony of Mr. Feliu and others, that they had received offers whereby in exchange of their flooded lands the respondents offered other lands, it will not be a hard task to state who is responsible of this situation. But in order to reach this conclusion we are not to be guided solely by the testimony of such witnesses, as it could be said in an extreme case that they are interested parties, as their lands are flooded. But we have besides letters appearing in our own files, subscribed by the manager of this company, making these offers in writing and giving as the reasons for this that they are good neighbors and that as the lands of their neighbors were flooded they did not want the latter to suffer any damages.

That is the situation that has been stated and it is my belief that by virtue of the terms of the franchise, the company was bound to know and to keep a fixed level above which it should not have allowed the waters of the lake to raise, unless this was caused by extraordinary circumstances. We shall presume, of course, that if the pond that served as an outlet to the lake is situated on lands controlled by the respondents, and that this pond has been completely dried out or eliminated, the respondents are responsible of the consequences, unless they prove to us the contrary in a conclusive manner. But we shall presume [fol. 37] that this situation could not have been created without their consent or knowledge.

Other questions were, of course, raised in the order that we issued as for example the approval of the assignments, the situation created by the mosquitoes in this zone, as well as other questions; but I understand that there is no need of discussing them when from the foregoing the conclusion may be reached definitely that the franchise should not continue to exist inasmuch as it has brought about difficulties to this Commission and to the Insular Government; difficulties to the Municipal Government of Lajas,

as well as annoyance, bother and damages to several private persons.

I suggest that this franchise be canceled solely with regard to that part authorizing the company to take water from the Guanica Lake and that in so far as the operation of a railway and the construction of a wharf are concerned, the same be left effective in its entirety, so as to issue separate new franchises identical in form to the one now in force, in favor of the present grantees of the old franchises. If the persons who enjoy at present the right granted by this franchise are interested in using these waters of the lake for purposes of irrigation there will be no objection to their filing a new petition submitting the highest level at which they agree to keep the waters, as well as the plan of the works that they intend to carry out in order that said level be permanently kept and then, after this has been done, the Commission will decide what it may deem convenient.

Respectfully submitted, Miguel A. Munoz, President of the Commission.

San Juan, Puerto Rico, March 7th, 1929.

Attest: L. F. de Vizcarrondo.

[fol. 38] EXHIBIT H TO PETITION

THE PEOPLE OF PUERTO RICO,
District of San Juan, ss:

O. B. Frazer, being duly sworn, deposes and says:

That he is the attorney for Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and H. B. Orde, appellants in the petition for appeal taken from the order rendered and entered by the Public Service Commission of Puerto Rico March 9th, 1929, which petition is accompanied by this affidavit; that this appeal is not taken with the object of delaying the cause, but solely because the appellants and the undersigned attorney verily believe that grave injustice and error have been committed in the order appealed from; that the reason why this sworn statement is subscribed by the deponent and not by the plaintiffs is that none of these appellants resides within the

Island of Puerto Rico and that they have authorized the deponent to present this appeal and affidavit.

O. B. Frazer.

Affidavit Number 172.

Sworn to and subscribed before me this 8th day of April, 1929, by O. B. Frazer, of full age, married, attorney-at-law, resident of San Juan, Puerto Rico, to me personally known.

R. Castro Fernandez, Notary Public.

[A twenty-five cent excise stamp is duly canceled.]

[fol. 39] In District Court for the Judicial District of San Juan, Puerto Rico

Civil No. 9192

Horace Havemeyer, Frank A. Dillingham, et als., Appellants,

v.

Public Service Commission of Puerto Rico, Defendant

Appeal from an Order of the Public Service Commission of Puerto Rico

Answer—Filed July 3, 1929

Now comes the Public Service Commission of Puerto Rico by the undersigned Attorney General and Assistant Attorney General, and in conformity with the provisions of Section 82 of Act No. 70, approved December 6, 1917, answers the petition for appeal filed herein by the appellants, and to that end states and alleges:

1. The Commission denies, for lack of sufficient information, that the plaintiffs are the sole partners of Russell & Company, Sucesores, S. en C. For the same reason it denies that the appellants are owners of part of franchise number 5, granted by the Executive Council of Puerto Rico to the Guanica Land Company, which refers to the use of certain waters from Guanica Lake for purposes of irrigation; and in connection with the said alleged cession the Commission alleges that the same has not been approved

by the Executive Council of Puerto Rico or by the Public Service Commission of Puerto Rico. It also denies, for lack of sufficient information, the averments of the second part of the first paragraph of the petition relative to the residence of each of the appellants, or the respective capacity of each of the members of the firm Russell & Company.

2. The Commission admits the averments of paragraph II of the petition.

3. The facts alleged in paragraph III of the petition are admitted.

4. The facts alleged under paragraph IV of the petition [fol. 40] are admitted, but defendant alleges that the acts of the Commission or of its officers, described therein, are entirely in accord with the law.

5. The Commission admits that the appellants, on November 27, 1928, filed an answer to the order to show cause, mentioned in the fifth paragraph of the petition. The defendant alleges that when said answer was filed, the appellants voluntarily submitted to the jurisdiction of the Commission and the latter was legally authorized thereby to decide the controversy as the same was brought before the Commission by the parties in interest.

6. The averments contained under paragraph sixth of the petition are admitted.

The defendant denies in general having committed the errors separately specified under paragraph seventh of the petition; and referring especially to each of the errors assigned under the twenty-four subdivisions which said paragraph contains, the Commission alleges:

That subdivisions 1, 2, 3, 4, 5 and 6 of said paragraph seventh contain alleged errors on questions of law which have been already judicially determined, against the appellants, in a case decided by the Circuit Court of Appeals for the First Circuit, entitled South Porto Rico Sugar Company et al. v. Munoz et al., 28 Fed. (2d) 820.

That the questions of law raised under said subdivisions of paragraph seventh of the petition affect the jurisdiction of the defendant and have been determined and decided by a final judgment rendered by a court of last resort in said suit, over the same subjects, for the same

reasons, in connection with the same parties herein and under the same capacity that they appear in this case.

Referring especially to the averments contained under subdivision four of said paragraph seven, the defendant alleges that it committed no error, and that in so far as the appellants are concerned the Commission acted with full legal authority.

Referring especially to the averments contained under subdivisions 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, [fol. 41] 21, 22, 23 and 24, the Commission especially alleges: That in its own acts it has complied with law, has used the most sound discretion and has taken into consideration the averments and the evidence offered by the parties in interest and legally admitted by the defendant during the course of the meetings held with the object of giving due consideration to the case at bar and considering always the public interests in general and particularly the interest of the inhabitants who reside or have their properties in the valley of Lajas.

That in accordance with the law, the resolution or order appealed from can not be reviewed by this court in so far as the manner of weighing the evidence offered and legally admitted during the hearing of the case is concerned; the defendant weighed this evidence in the exercise of its discretional power in order to enter the findings of facts which served as basis to the order appealed from.

The defendant especially alleges, in connection with the alleged error assigned under subdivision 23 of said paragraph seven, that it has full discretionary authority to acquiesce to an ocular inspection, or to deny it, in any case under its consideration, and that it acted correctly in refusing an ocular inspection in the present case, inasmuch as it was of the opinion that the same was unnecessary.

7. The Commission alleges that the whole of paragraph nine of the petition is immaterial and irrelevant. That said paragraph does not state specific errors, but only mere conclusions of law, vaguely expressed and hence the same should not be considered by this court and should be stricken from the petition.

The Commission denies that it has violated any constitutional or statutory provision in the case to which the present appeal refers. On the contrary, it sets forth and alleges that all its acts and resolutions therein were agree-

able to the law in force, in accordance with the most sound judicial discretion and that their sole object was the protection of the public interest in general and particularly the interest of the persons residing in the valley of Lajas, which had been flooded to the great prejudice of life and [fol. 42] property by reason of the activities contrary to law on the part of the appellants or their predecessors, who wrongfully used the rights granted them by virtue of franchise number 5 of the Executive Council of Puerto Rico, partially canceled by this Commision. And it alleges besides that the order from which the present appeal has been taken is just and reasonable, is based on grounds of the most sound public covnenience and that the same has been entered by the defendant after fully hearing all the parties in interest and after giving, especially to the appellants, the fullest opportunity to defend themselves and of utilizing whatever proceedings they deemed convenient and necessary to their defense.

8. The defendant alleges that the petition for appeal in this case does not state sufficient reasons to be worthy of consideration by this court whose authority to review these cases is restricted and limited to the correction of certain class of errors not duly assigned in this petition, which for said reason ought to be dismissed.

By virtue whereof the defendant prays this court that the petition be dismissed and that the order appealed from be sustained in its entirety, by affirming it and sentencing the appellants to the payment of costs.

San Juan, Puerto Rico, July 2, 1929.

James R. Beverley, Attorney General of Puerto Rico; M. Rodriguez Serra, Assistant Attorney General.

[File endorsement omitted.]

Copy served this third day of July, 1929.

O. B. Frazer, Attorney for the Appellants.

[fol. 43] IN DISTRICT COURT OF SAN JUAN

ANSWER—Filed July 22, 1929

Now comes the Municipality of Lajas, as one of the defendants and appellees herein and by its undersigned at-

torney objects to the appeal filed by Horace Havemyer, Frank A. Dillingham et als., and states and sets forth as follows:

I. Owing to lack of sufficient information and belief to answer everything relative to the organization of the civil agricultural partnership Russell & Company and to the residence of the persons who claim to be members thereof, this defendant and appellee denies this averment. This defendant also denies, for lack of information and belief, everything alleged with reference to the acquisition by said persons of part of franchise number 5, granted to the Guanica Land Company for purposes of irrigation. The defendant and appellee also denies, for lack of information and belief, everything alleged under paragraph one of the petition for appeal in connection with the residence of the members of Russell & Company, and the defendant and appellee on the contrary alleges that the transfer or cession of the franchise which the petitioners herein claim, has never been approved by the Executive Council of Puerto Rico or by its successor, the Public Service Commission.

II. It admits paragraph two of the petition for appeal.

III. It also admits the statement of facts contained under paragraph three of the petition for appeal.

IV. It admits the facts averred under paragraph four of the petition for appeal and, on the contrary, alleges that in accordance with the authority granted by law to the Public Service Commision of Puerto Rico, no substantial error was committed by said Commission or by its officers, and that its proceedings were agreeable to the law in force, inas much as the Public Service Commision, in so far as the Commission itself was concerned, acted by voluntary submission of the appellants through its officers and duly authorized representatives.

V. It admits that the petitioners answered on November [fol. 44] 27, 1928, the order to show cause entered by the Public Service Commission on May 26, 1928; and it consequently avers that the petitioners submitted to the jurisdiction of the Public Service Commission when they filed their alleged answer (Exhibit F) inasmuch as with that averment the petitioners failed to insist that they were appearing especially and also on the motion to dismiss the

case that they had formerly filed, and on the contrary acknowledged and admitted the jurisdiction of the Public Service Commision to decide the case on the merits.

VI. The defendant admits the sixth paragraph of the petition for appeal.

VII. The defendant-appellee, the Municipality of Lajas, answers subdivisions 1, 2, 3, 4, 5 and 6 of paragraph seven of the petition for appeal by alleging that between the same parties, and for the same cause of action to which this petition for appeal refers, the questions of law raised in said assignments of error were definitively decided in South Porto Rico Sugar Company v. Munoz, 28 Fed. (2d) 820; and consequently the question is res judicata between the parties by reason of the above judgment of the Circuit Court of Appeals of Boston.

In connection with the assignments of error contained under subdivisions seven to twenty-three of the seventh paragraph of the petition for appeal, the defendant and appellee, Municipality of Lajas, alleges that the order of March 9, 1929, of the Public Service Commission of Puerto Rico is agreeable to the law of its creation, and its findings of fact can not be altered or reviewed by the District Court of San Juan in a petition for appeal like the present; and that the said order of March 9, 1929, is directly in accord with the highest considerations of public order and is in accord with the provisions of Act No. 70 of 1917.

And as regards subdivision number twenty-three of said paragraph seven of the petition for appeal, the Municipality of Lajas alleges that the Public Service Commission, acting as a court of justice, may discretionally acquiesce to a petition for an ocular view, or may deny the same without committing any fundamental error whatsoever.

[fol. 45] And the Municipality of Lajas finally alleges, in connection with the averments of subdivision twenty-four of paragraph seven of the petition for appeal, that an assignment which does not specify errors is vague and obscure, and, consequently, is not justified by law or precedents.

VIII. The defendant-appellee, Municipality of Lajas, admits that the documents mentioned under paragraph eight of the petition for appeal have been joined thereto.

IX. The Municipality of Lajas accepts the ninth paragraph of the petition for appeal by alleging: That said paragraph contains nothing specifying a substantial error or an error of procedure on the part of the Public Service Commission of Puerto Rico; and that as paragraph nine of the petition is a summary of the conclusions of law of the petitioners or appellants not justifiable under the adjective side of the law applicable to the case, the District Court should dismiss everything stated and alleged under said paragraph nine of the petition for appeal by ordering its elimination for the same is irrelevant and redundant.

The defendant Municipality of Lajas, on the contrary, alleges that the Public Service Commission has not violated any legal precept nor has deprived the plaintiffs-appellants of any of their constitutional rights; and it alleges, furthermore, that everything that the Public Service Commission has done or held in the case at bar is agreeable to the purposes for which the said Commission was created, namely, to protect and defend the public interests of the Island of Puerto Rico, and particularly the interests, life and health of the residents of the valley of Lajas affected by the behavior of the appellants herein or their legal representatives, employees or assistants. And the Municipality of Lajas especially alleges that the appellants in this case have had their day in court and have enjoyed all the constitutional guarantees granted for their defense before the Public Service Commission, and that the order of which they now complain is the direct consequence of the evidence offered and adduced before said Commission by the appellants herein.

Wherefore the Municipality of Lajas prays the Honor-[fol. 46] able District Court of San Juan that the petition for appeal filed by the petitioners be dismissed in due course and that the order of the Public Service Commission of March 8, 1929, be affirmed and sustained in its entirety, and that the appellants be sentenced to pay the costs of this suit.

Ponce for San Juan, July 20, 1929.

Rafael Perez Marchand, Attorney for the Municipality of Lajas.

I, Rafael V. Perez Marchand, of full age, resident of Ponce, attorney-at-law, as counsel for the defendant-appellee, Municipality of Lajas, de hereby certify:

That there is between San Juan and Ponce a daily mail service and that on this date I have deposited in the United States post office at Ponce an envelope duly postpaid, addressed to the attorney for the appellants, O. B. Frazer, Esq., San Juan, Puerto Rico, and that said envelope contained a true and faithful copy of the preceding answer.

Rafael V. Perez Marchand, Attorney for the Defendant-Appellee.

[File endorsement omitted.]

BEFORE PUBLIC SERVICE COMMISSION OF PUERTO RICO

INTERLOCUTORY ORDER

Considering in detail that the conditions existing in the so-called Valley of Lajas make it necessary to take urgent measures to counteract the damages which the residents and neighbors of said zone have been suffering as a consequence of the flood of said valley;

Considering that in accordance with the report rendered by Dr. Antonio Arbona, Medical Inspector of the Bureau of Malaria of the Health Department of Puerto Rico, it appears that the immediate and partial drainage of this pond is feasible; inasmuch as in said report the following appears:

"That the height of the waters, both in the lake and in [fol. 47] the flooded region, over the level of the sea was 12.74 feet (3.883 meters), the first of July, on which date the inspection was made;

"That the height of the bottom of the lake in its lowest side, over the level of the highest tide was 3.88 feet (1.18 meters), the result being that the difference between the two heights gives 8.86 feet of water (2.70 meters) in the deepest part of the lake.

"That the height of the bottom of Angostura or Carril, as this place is also known, which is the actual communication between the lake and the Anegado (flooded region) was 5.20 feet (1.59 meters), over the highest tide in the deepest part, and deducing this from the 12.74 feet (3.883

meters) above mentioned, shows a difference of 7.64 feet (2.30 meters) of water in the deepest place;

"That the average height of the bottom of Anegado (flooded region) was 10.12 feet (3.09 meters) which deducted from the 12.74 feet (3.883 meters) above mentioned, gives a balance of 2.62 feet (0.80 meters), as the average depth of Anegado; taking into consideration that these 2.62 feet (0.80 meters) do not apply to the natural ponds existing within the Anegado.

"That the above figures show how easily the Anegado would be drained by gravity, and to that end it will be necessary to lower the level of the lake 2.62 feet (0.80 meters), plus another foot (0.30 meter) to ensure an efficient work, and this would leave water in the deepest ponds, like that of Angostura, alone, the area of which would offer no danger of malaria, as the same could be overcome by using germicides, there being no need of altering any further than as above stated the height of the waters of the lake.

"If this is done, 5.24 feet (1.60 meters) of water would remain in the deepest part.

"It is well known that the height of the lake in its lowest side is 3.88 feet (1.18 meters) over the level of the highest tide, and that the length of Negros Pond, which seems to be [fol. 48] the natural outlet of the lake is about 3,900 lineal meters (12,792 feet) from end to end, between the sea and the lake, this will give us a difference in height of .000304% in times of high tides, in order to entirely drain it, if so desired. But the only object being to lower the level of the lake 3.62 feet (1.105 meters) in order to secure the drainage of the Anegado (flooded region) by gravity, we have then a difference in height of 9.12 feet (1.78 meters, sic.) between the desired level and the highest tide, which distributed among the 3,900 lineal meters (12,792 feet), the length of the pond, will give us a gradual descent of .000712%, this being more than enough for the object we have in view.

"By reason of the foregoing data, without entering into further details with regard to declivities, the consideration of the necessary works should be begun, and an approximate budget for carrying them out should be prepared.

"Wherefore the Public Service Commission of Puerto Rico requests: Russell & Company, Sucrs., S. en C.; Ensenada Estates, Inc., and its assignees; Guanica Central, and its assignees; and any other person or legal entity which may have acquired rights, by assignment or purchase, of the above entitled franchise; to—taking into consideration the details appearing in the preceding report—prepare a draft of the works to be done with the object of lowering the level of the waters of the lake until this level reaches a point equivalent to one foot lower than the lowest point, in the place known as Angostura; it being understood that this report of the works to be carried out should be made within 10 days from the date this order is served, and that the measure adopted is purely and simply an emergency measure, whose principal object is to remedy the immediate situation of the zone in question, and that this in no wise will prejudice the questions involved in this case; and it being understood, furthermore, that the draft of the works shall contain an estimate of their cost as well as of the time that it will be required to drain the lake by means of said works."

[fol. 49] This order was entered with the unanimous vote of the Commissioners present, there being a quorum.

San Juan, Puerto Rico, December 17, 1928.

Miguel A. Munoz, President. Attest: L. F. de Vizcarrondo, Secretary.

Copy of this order was sent on the 19th day of December, 1928, to Attorney O. B. Frazer, San Juan; Attorney R. V. Perez Marchand, Ponce; Mr. Juan N. Matos, Lajas; Hon. Mayor, Lajas, Hon. Mayor, Guanica.

Luis Freyre Diaz, Deputy Secretary.

In District Court for the Judicial District of San Juan, Puerto Rico

Civil Number 9192

Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, as Partners of the Civil Agricultural Partnership Russell & Company, Sucrs., S. en C., Plaintiffs,

v.

Public Service Commission of Puerto Rico, Defendant

Appeal from an Order of the Public Service Commission of Puerto Rico

Civil Number 9193

Municipality of Guanica, Plaintiff,

v.

Public Service Commission of Puerto Rico, Defendant

Appeal from an Order of the Public Service Commission of Puerto Rico

Statement of the Case and Opinion

Though two separate appeals have been presented to this court, as they both refer to the same matter and have been taken from the order entered by the Public Service Commission of Puerto Rico under date of March 8, 1929, in case [fol. 50] number J2763 of said Commission, we shall consider and decide the said two appeals jointly.

The facts of this case are briefly as follows: The Executive Council of Puerto Rico, on March 19, 1901, granted to an entity known at the time as Guanica Land Company, franchise number five, entitled "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica". (Exhibit A, joined to the petition for appeal in case Number 9192, contains a full copy of this franchise.)

The appellants, as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C., allege that they are the actual holders of said franchise.

The Municipality of Lajas, Puerto Rico, through its Municipal Assembly, in a special session held February 24, 1928, adopted a resolution approved by the mayor October 27th of said month and year, the final part of which reads thus:

"Therefore, be it resolved by the Municipal Assembly of Lajas, Puerto Rico:

"I. To complain before the Public Service Commission of Puerto Rico and before the Commissioner of the Interior of Puerto Rico that the engineering works carried out on Negro Pond of Guanica Lake are causing irreparable damages to the Municipality of Lajas, by throwing the waters of Guanica Lake beyond their highest level; by invading, as they have municipal roads numbers 9 and 10 of this jurisdiction, and by making the life of the residents and real estate owners of the wards of Costa and Plata impossible, and in order that an investigation of the case be made by the proper party so as to protect the interest of one of the richest regions of Puerto Rico and the health and life of this community.

[fol. 51] "II. To send a certified copy of this resolution to the Hon. Public Service Commission of Puerto Rico, another copy to the Hon. Governor of Puero Rico and a third one to the Commissioner of the Interior for their information and control.

"III. This resolution being of an urgent nature will become effective immediately after its approval by the Hon. Mayor, and repeals and annuls any other resolution, ordinance or proclamation contrary thereto."

The Hon. Horace M. Towner, the then Governor of Puerto Rico, transmitted to the president of the Public Service Commission an official letter dated May 22, 1928 (Exhibit D), accompanying another letter from the Commissioner of the Interior, Mr. Esteves, of the same date (Exhibit D) and recommending the Public Service Commission to take the corresponding action.

On May 26, 1928, the Public Service Commission entered an order addressed to the respondent Russell & Co., Sucrs.,

S. en C.; Ensenada Estates, Inc., and to their assignees; Guanica Central and its assignees, and to any other person who might have acquired rights, by grant or cession, on said franchise No. 5, commanding them to appear and show cause why the said franchise should not be totally cancelled by the Public Service Commission; June 4, 1928, at 2.30 P. M., was set for their appearance.

The hearing was postponed by reason of an injunction proceeding filed by the respondent before the Federal Court. This injunction proceeding was dismissed by said court, and its decision was affirmed by the Circuit Court of Appeals at Boston.

Finally, the order to show cause began to be heard before the Public Service Commission of Puerto Rico on November 27, 1928 and continued on the 18th, 19th, and 20th of February, 1929.

To said hearing before the Public Service Commission appeared: the Municipality of Lajas (complainant), Russell & Co., Sucrs., S. en C. (respondent) and the Municipality of Guanica, as intervenor and in opposition to the complaint.

[fol. 52] After the hearing ended, the Public Service Commission of Puerto Rico entered the following

"Order

"For the reasons stated in the report of the President of this Commission, dated March 7th, 1929, and for the conclusions reached therein—the said report being hereby approved and made a part of this order—the Commission, after carefully studying the record of this case and fully considering the matter.

"Orders the cancellation—as it hereby cancels—of that part of franchise number 5 which refers to the use of certain waters of Guanica Lake for purposes of irrigation, granted by the former Executive Council of Puerto Rico on March 19th, 1901, entitled "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica;

"Provided that this cancellation shall become effective June 30th, 1929. It is understood, furthermore, that in the

meantime the parties in interest are at liberty to file any further petition which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the lake, as well as the plans of any other works, in order that this level may be permanently kept.

"This order was rendered with the unanimous vote of the commissioners. Let the parties be notified.

"San Juan, Puerto Rico, March 8th, 1929.

Miguel A. Munoz, President of the Commission. Attest: L. F. de Vizcarrondo, Secretary."

Said order was notified to the parties in interest and in due course and form separate appeals were taken there- [fol. 53] from by Horace Havemeyer et als., as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C., and by the Municipality of Guanica.

At the request of the Public Service Commission of Puerto Rico the Municipality of Lajas was joined as a party defendant in these two cases, on appeal.

The hearing of these cases, on appeal, was held jointly before the District Court, after due setting, the 29th of October, 1929.

The appellants Russell & Co., Sucrs., S. en C., and the Municipality of Guanica (sic) appeared by their attorney O. B. Frazer, and the Public Service Commission through M. Rodriguez Serra, Esq., Assistant Attorney General.

The return containing all the evidence adduced and all the proceedings which took place during the hearing of these cases before the Public Service Commission was duly brought up to this District Court.

At the hearing the appellants requested this District Court to take an ocular view of the place, and the court hereby denies the said petition, as it is of the opinion that the same is unnecessary, inasmuch as from the testimony of the witnesses and especially from the considerable number of photographs taken into consideration by the Public Service Commission, which have been forwarded to this District Court, this court is fully cognizant of the conditions existing in that region, there being no need of seeing the same personally.

The cases were submitted to the consideration and determination of this District Court through written briefs. The same were presented on the following dates: That of the appellants, December 23, 1929; that of the Public Service Commission, January 22, 1930, and that of the Municipality of Lajas on March 1, 1930.

The two cases which this District Court of San Juan has now under consideration are of its own exclusive jurisdiction. No other District Court of the island may consider this class of appeals, in view of the fact that Section 78 of the Public Service Act (No. 70 of December 6, 1917) has so expressly provided.

[fol. 54] Before deciding these appeals we must state, that we are of the opinion that in these special cases, taking into consideration the provisions of Act No. 70 of 1917, and especially in accordance with Sections 83, 84, 85 and 86 thereof, the sole duty of this court is to review, the same as is done by the Supreme Court in considering appeals from the District Courts, all of the evidence presented before the Public Service Commission, which has been forwarded to this District Court in the transcript of the record, and, consequently, to determine and decide:

"1. Whether the order appealed from, rendered by the Public Service Commission on March 8th, 1929, is reasonable or not.

"2. Whether said order is legal or not.

"3. Whether it has been based on incompetent evidence, affecting the decision and order of the Commission."

The appellants in their petition for appeal assign errors which they claim were committed by the Public Service Commission in entering the order which is the basis of the appeals.

The appellant, Russell & Co., Sucrs., S. en C., in its petition alleges that the Public Service Commission committed 24 errors, which are separately assigned; and the other appellant, Municipality of Guanica, assigns similarly 11 errors.

Once the foregoing explanations have been made, we shall now decide jointly the two appeals taken.

The learned counsel for the Public Service Commission raises in his brief a very important question which is briefly as follows:

"That the appellants, who are members of the partnership Russell & Co., Sucrs., S. en C., are not a public service corporation in accordance with the provisions of Section two of Act No. 70 of 1917, nor in accordance with par. XXI of the franchise, which literally quoted reads thus:

" 'Nothing herein in this grant contained, shall be construed to give the said Company, or its successors, or to the assigns in whole or in part of any of the rights and *and* privileges herein granted, the right, directly or indirectly, [fol. 55] with or without compensation in money or otherwise, to use, hire, lease, sell or otherwise dispose of the waters of said lake or any part thereof for the purpose of irrigating any lands other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold.' "

We incline to the view that the learned counsel of the Public Service Commission is absolutely right in his theory, and we might perhaps be inclined to dismiss the appeals without considering other questions.

But it is logical to suppose that if an Appellate Court decided that we are mistaken in upholding the viewpoint of counsel for the Public Service Commission, our judgment would be reversed and the case remanded to this District Court in order that the appeals be decided on the merits, and for this reason and with the object of obviating delays in the administration of justice, in cases similar in nature to the one at bar, we shall consider and decide the said appeals on the merits.

We agree with counsel for the appellant when he states at pages 4 and 5 of his brief that all the errors imputed to the Public Service Commission in ordering the cancellation of the franchise, may be summarized as follows:

"1. That the Public Service Commission erred in assuming that it had jurisdiction over the subject matter and over the parties.

"2. The Commission erred in holding that there was sufficient legal ground to authorized the cancellation of the franchise.

"3. The Commission erred in holding that the remedy by suit granted by par. 4 of the franchise was not the sole remedy, for the facts alleged by the complainants.

"4. The Commission erred in holding that the appellants [fol. 56] had not taken all the necessary steps to remedy the situation prior to the hearing before the Public Service Commission."

We shall discuss and decide them according to their order.

We are of the opinion that the first and second errors assigned have not been committed, as held by the Circuit Court of Appeals of Boston, whose opinion we quote in toto hereinafter:

"On May 28, 1928, the Public Service Commission of Porto Rico issued to appellants an order of notice to appear on June 4, 1928, and show cause why said commission should not cancel a franchise granted, on March 19, 1901, to appellant's predecessors in title, by the Executive Council of Porto Rico, to use daily 20,000,000 gallons of the waters of Lake Guanica for irrigation, for the construction and operation of a private railroad to run in part over lands subject to public rights, and to construct and maintain a dock on the Bay of Guanica. Without appearing before the commission, the appellants filed on June 2, 1928, a bill in equity seeking an injunction to restrain the commission from interfering in any way with the enjoyment of their powers under this franchise, and from asserting any jurisdiction over the appellants in respect to said franchise. The court below sustained a motion to dismiss filed by the Attorney General of Porto Rico, holding, in a well-reasoned and cogent opinion, both that the suit was premature and that the Public Service Commission had jurisdiction. This decision was right on both points.

"(1) Courts have no general supervisory power over such tribunals as public service commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon property rights. American Coal Mining Co. v. Special Coal & Food Commission (D. C.), 268 F. 563; Sayers v. Montpelier & Wells River R. R., 90 Vt. 201, 97 A. 660, Ann. Cas. 1918 B, 1050.

"(2) If we assume for the moment that this Public Serv-
[fol. 57] ice Commission has no jurisdiction, the issuance of an order of notice was no such assertion of authority or threat of irreparable injury as to warrant injunctive interference by the court. It would not follow that, on appearance and argument, the commission would adhere to an erroneous view as to the nature and extent of its jurisdiction. The appellants' case in that regard is not supported by the cases relied upon by their learned counsel. Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570, and cases cited; Work v. Louisiana, 269 U. S. 250, 46 S. Ct. 92, 70 L. Ed. 259; Gallardo v. Porto Rico Light & Power Co. (C. C. A.), 18 F. (2nd) 918; Benedicto v. West India & Panama Tel. Co. (C. C. A.), 256 F. 417.

"Affirmation of the decree below (dismissing the bill) would doubtless be warranted on this ground alone. But it is plainly in the interest of the parties that we deal now, rather than possibly in a later suit, with the fundamental question of the jurisdiction of the commission to maintain proceedings looking to the repeal, alteration or modification of the appellant's franchise.

"Under the first Organic Act of Porto Rico—the Foraker Act of April 12, 1900, 31 Stat. 77, (48 U. S. C. A., Sect. 731 et seq.)—Congress provided for this recently acquired possession a legislative assembly, consisting of an elective lower chamber, and, in lieu of a senate, an Executive Council, consisting of six heads of the executive departments, appointed by the President. At the end of the section 31 it was enacted:

" 'Provided, however, that all laws enacted by the legislature assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same.'

"Section 32 reads:

" 'That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to * * * repeal any and
[fol. 58] all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: Pro-

vided, however, that all grants of franchises, rights, and privileges or concessions of a public or quasi public nature shall be made by the executive council, with the approval of the Governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.'

"Franchises and laws were both thus required to be reported to Congress, which reserved power to annul either or both.

"Under the joint resolution of May 1, 1900, 31 Stat. 715, amending the Foraker Act of April 12, 1900, it was provided:

" 'That all franchises, privileges or concessions granted under section 32 of said act shall provide that the same shall be subject to amendment, alteration or repeal.'

"This was the familiar provision intended to meet the doctrine of the Dartmouth College Case. Pursuant to these powers, the Executive Council the next year (1901) granted the franchise in question, providing in article XVIII 'that the franchises, privileges and concessions hereby granted shall be subject to amendment, alteration or repeal.'

"The same general power to annul laws enacted by the Legislature of Porto Rico is retained in section 34 of the Second Organic Act—the Jones Act of March 2, 1917, 39 Stat. 951. 48 U. S. C. A., Sect. 822 et seq. In thus reserving in both Organic Acts power to annul laws enacted and franchises granted by the Porto Rican government, Congress acted in close analogy to its long-continued practice with relation to territories within the boundaries of the present United States—prospectively states. Compare the Organic Act of Oregon, 9 Stat. 323, Sect. 6; of Minnesota, 9 Stat. 403; of New Mexico, 9 Stat. 446; of Utah, 9 Stat., 453; of Washington, 10 Stat. 172. The purpose obviously, [fol. 59] both in Porto Rico and with our own territories, was to provide a quasi guardianship during a probative period, over a developing political society, by requiring full reports (itself a sobering check) of all important performances of the local government, and by reserving power to annul any act sinister or dangerously foolish, in origin or in effect.

"The new Organic Act substantially changed the form of government by providing for an elected Senate, having, in

general, the legislative powers previously exercised by the abolished Executive Council. Compare section 12. It also provided in section 38 for a Public Service Commission, and enacted:

" 'The said commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council. Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor, and shall be reported to Congress, which hereby reserves the power to annul or modify the same.' 48 U. S. C. A., Sect. 750.

"Congress thus apparently vested full control over franchises, old and new, in the Public Service Commission.

"But the Jones Act also vested in the Porto Rican Legislature (compare sections 25 and 37) general legislative authority over all matters of a legislative character not locally inapplicable or inconsistent with the provisions of the Organic Act. Under this power, the Legislature, by Act No. 70, approved December 6, 1917 (Laws of Porto Rico, Vol. 2, pp. 432-546) Section 60, enacted:

" 'Section 60. Violation of existing franchises. Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Executive Council and is now in force: Provided, however, That the commission shall have the power to alter, amend, modify, or repeal such franchises, and shall exercise all the [fol. 60] rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law.'

"(3) This law was of course reported to Congress and it has not been annulled. This has some tendency to show approval by Congress. Chuoco Tiaco v. Forbes, 228 U. S. 549, 558, 33 S. Ct. 585, 57 L. Ed. 960; Fajardo Sugar Co. v. Holcomb (C. C. A.) 16 F. (2nd) 92, 96.

"It is thus clear, and appellants' learned counsel concedes, that the Jones Act or the Legislature of Porto Rico, or both together, vested in the Public Service Commission all powers over franchises originally vested in the Executive Council.

"(4) The appellants' contention of no jurisdiction in that commission, therefore, rests entirely on the proposition,

that Congress reserved to itself alone jurisdiction to repeal or amend franchises granted by the Executive Council. It grounds this proposition on the reservation contained in section 32 of the Foraker Act, supra: 'All franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.' Necessarily this contention also asserts the invalidity of that portion of section 60 of the Act of Porto Rico, No. 70, approved December 6, 1917, supra, which explicitly provides that the Public Service Commission shall have the power to alter, amend or repeal franchises previously granted by the Executive Council.

"We cannot adopt this construction of the general reservation by Congress of the power to annul all franchises and laws of the experimental local government set up by Congress in Portio Rico. We are constrained to hold that the purpose of Congress was, experimentally and gradually, to vest in the Porto Rican government the general powers of state governments, subject to the reserved power to annul or modify franchises and laws if and when Congress sees fit. The reservation of the power to annul franchises granted by the Executive Council is in the same general terms as the reservation of the power to annul all laws. [fol. 61] It did not in 1901 exclude the power granted by fair and necessary implication to the Executive Council to modify or repeal franchises granted by that council. The like reservation contained in the Jones Act does not exclude or cut down the power of the Public Service Commission to repeal or alter franchises granted by it. Like the power to repeal statutes, the body that creates may alter or destroy the creation.

"The decree of the District Court is affirmed, with costs to the appellees in this court."

We hold that the third error has not been committed, inasmuch as the fact that the parties prejudiced may be indemnified through legal actions, can in no wise deprive the Public Service Commission of the authority and of the duty expressly imposed by the Organic Act of repealing or annulling franchises when there are sufficient merits for so doing.

With regard to the fourth and last error, we are of the opinion that it cannot be held that the same has been committed.

In effect, from the letter dated May 22, 1928, addressed by the Commissioner of the Interior to the Governor of Puerto Rico (Exhibit D) the following appears:

"* * * that according to the records of our files, the Guanica Land Company never submitted plans of the works to be done across 'Cano Negro.' There is no record that the customary level of Guanica Lake during rainy seasons at the time the franchise was granted, was ever determined. From the investigation we have been able to ascertain that several municipal roads of the Municipalities of Lajas and Guanica, since 1926, are flooded and that considerable amount of private lands are at present well under water, and to our knowledge none of the damages sustained by abutting owners have been borne by said Guanica Company."

Section 1 of the franchise authorizes the grantee to construct and operate a dam of masonry work or other materials across the Cano Negro or outlet from Guanica Lake and upon public lands of abutting owners as may have been [fol. 62] acquired for the purpose of retaining and regulating the flow of the waters from said lake, or for the purposes otherwise specified. By virtue of the franchise, the grantee or its successors assumed control of the flow of the waters from the lake and the power to raise the level of the waters from the lake remained exclusively in its own hands. As it has been seen, the grantees never complied with the duty—voluntarily contracted by them in accepting the franchise—of submitting plans of said works to the Commissioner of the Interior. And said works have been done and they have taken waters on certain occasions in such a way, as for example in 1914 and in 1922, and specifically from and after July 1926 till May 1928, on which date the Public Service Commission ordered them to show cause, as has been already stated (Exhibit B) why they allowed the level of the waters of Guanica Lake to raise to a level higher than the customary one thereof during the rainy season in years of average and usual rainfall, thus violating the provisions of section 4 of the franchise.

Such an excess of water in the lake over and above the customary level in years of average rainfall, flooded to an average depth of two or three feet of water a zone of lands whose area varies between five and six thousand cuerdas,

in the Municipality of Lajas, thus causing grave injury to the owners of the lands flooded and to the community in general. The flood spread and covered the municipal roads known as Fabiani and Don Mariano, and partially interrupted communication with the railroad station of the American Railroad Company in the ward of La Plata of said municipality.

These facts were shown to the satisfaction of the Commission with the enormous amount of evidence which this court has seen in the transcript of record: with the evidence of expert engineers from the Department of the Interior who made special investigations, and with the testimony of witnesses, etc.

We decide and hold that the order of the Public Service Commission of March 8, 1929, was issued with full authority and that the same is reasonable, correct and justified, being based on the legal reasons which we quote hereinafter:

[fol. 63] Section 54 of Act No. 70 of 1917 reads:

"Grants subject to repeal and alteration. All grants of franchises, rights, privileges or concessions shall be subject to amendment, alteration or repeal by the commission, and shall provide for the same."

This section is a reproduction of the provisions contained under Section 39 of the Organic Act of March 2, 1917, as follows:

"That all grants of franchises and privileges under the section last preceding shall provide that the same shall be subject to amendment, alteration, or repeal, etc."

And of the Joint Resolution of the Congress of the United States, approved May 1, 1901, Section 3:

"That all franchises, privileges and concessions granted under Section 32 of the said Foraker Act shall provide that the same shall be subject to amendment, alteration or repeal."

And Section 60 of the Public Service Act, No. 70, reads:

"Violation of existing franchises.—Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Executive Council

and is now in force; Provided, however, That the commission shall have the power to alter, amend, modify or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law."

See also South Porto Rico Sugar Co. et al. v. Munoz et al., supra, 28 Fed. (2d) 820.

The appellants do not allege that the order appealed from is based on incompetent evidence. The record shows that the Commission had before it abundant evidence offered by the parties, and that it handed its decision after considering said evidence. Neither in the petition for appeal nor in the brief for the appellants any error is assigned for admitting evidence which was legally incompe- [fol. 64] tent and which materially affected the decision of the case.

Section 84 of Act No. 70 of 1917 provides:

"Orders as evidence—Burden of proof.—In all such cases the orders of the commission shall be prima facie evidence of the reasonableness thereof, and the burden of proving the contrary shall be upon the appellant or appellants; * * *."

"The reasonableness of an order of the Public Service Commission depends on whether it is arbitrary, capricious, or unlawful. State ex rel. Ozark Power and Water Co. v. Public Service Commission of Missouri, 229 S. W. 782, 287 Mo. 522.

"Findings of the Public Service Commission are presumptively correct." Chesapeake & Potomac Telephone Co. v. Whitman, 3 Fed. (2d) 938.

"Findings of the Public Utilities Commission should not be disturbed by the Supreme Court as being against the weight of the evidence, unless they are so manifestly against the weight of evidence and so clearly unsupported by it as to show misapprehension, mistake, or willful disregard of duty. Village of St. Clairsville v. Public Utilities Commission, 132 N. E. 151, 102 Ohio St. 754.

"* * * when the Public Service Commission makes an order within the purview of its statutory powers, it will be deemed reasonable and just, and a court will not prevent its enforcement unless it clearly appears that it is unjust

and unreasonable." Alabama Great Southern R. Co. v. Alabama Public Service Commission, 97 So. 226, 210 Ala. 151.

"Orders of the Commerce Commission are entitled to great weight, and can be set aside only if arbitrary or unreasonable, or in clear violation of law, and courts should review or interfere with them only so far as necessary to keep them within their jurisdiction and protect constitutional rights." Wabash C. & W. Ry. Co. v. Commerce Commission, 141 N. E. 212, 309 Ill. 412.

[fol. 65] "A court is not authorized to put itself in the place of the Commerce Commission, try the question anew, and substitute its judgment for that of the Commission. Id. Id.

"Findings of the Public Utilities Commission have the force and effect of reports of special masters in courts of equity, and are conclusive on courts, unless manifestly against evidence." State Public Utilities Commission, ex rel. Chicago Board of Trade, v. Toledo, St. L. & W. R. Co., 122 N. E. 158, 286 Ill. 582.

"In direct appeals to the Supreme Court from direct orders of the railroad commission, such orders will not be reversed unless it affirmatively appears from the record that they are clearly wrong." In re Southern Nebraska Power Co. v. Taylor et al., 192 N. W. 317-318, 109 Neb. 683.

We adopt, with approval, the following statements contained in the brief for the Public Service Commission:

"The order appealed from by itself shows its reasonableness.

"While it orders the cancellation of that part of the franchise which refers to the use of certain waters, it is at the same time liberal and benevolent as it leaves the parties in interest at liberty to file whatever new petitions with regard to the use of the waters they may deem wise and to submit to the Commission specific data as to the maximum height, as well as the drafts of any works that may be done to keep the waters at a permanent level.

"Being compelled to take serious steps in order to protect the inhabitants and the owners of the valley of Lajas from the acts of the holder of the franchise, the Commission did the least that it could do, namely: deprive them of the legal means with which they could continue causing in-

jury, but at the same time it gave them a new opportunity for using the waters with the assurance that such state of affairs as the one which gave rise to the order appealed from would not be repeated.

[fol. 66] "The court, after a careful examination of the record of this case, reaches the following conclusions:

"That the order appealed from, dated March 8th, 1929, is reasonable and agreeable to law."

For the foregoing reasons and considering Section 85 of Act No. 70 of 1917, the court is of opinion that judgment should be rendered dismissing the appeal taken in each of these cases and affirming the order rendered by the Public Service Commission on March 8, 1929, in case No. J2763, and sentencing the appellants to the payment of costs.

Let separate judgments be rendered in each case, in conformity with the terms of this opinion, and let the necessary writs and orders issue to make them effective.

San Juan, Puerto Rico, June 4, 1930.

Domingo Sepulveda, Judge.

IN DISTRICT COURT OF SAN JUAN

JUDGMENT

The hearing of this case on appeal was held before this District Court, after due setting in the calendar, the twenty-ninth day of October, 1929. The appellants, Horace Havemeyer, Frank M. Welty, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold and Henry B. Orde, as partners of the civil agricultural partnership, Russell & Co., Sucrs., S. en C., appeared by their counsel O. B. Frazer, Esq., and the Public Service Commission by M. Rodriguez Serra, Esq., Assistant Attorney General.

The appellants requested that an ocular inspection be taken and the same was denied for the reasons stated in the foregoing opinion; no additional evidence was presented, the case having been decided on the return brought up to this court, which contains all the evidence adduced, as well as all proceedings which took place during the hearing of this case, before the Public Service Commission. The case was submitted through written briefs presented in due course.

The court hereby, and for the reasons stated in the opin-
[fol. 67] ion delivered on this date, joined to the record and made a part thereof, renders judgment dismissing the appeal taken herein and affirming the order entered by the Public Service Commission on March 8, 1929, in case No. J2763, which literally quoted reads thus:

"Order

"For the reasons stated in the report of the President of this Commission, dated March 7th, 1929, and for the conclusions reached therein—the said report being hereby approved and made a part of this order—the Commission, after carefully studying the record of this case and fully considering the matter,

"Orders the cancellation—as it hereby cancels—of that part of franchise No. 5 which refers to the use of certain waters of Guanica Lake for purposes of irrigation, granted by the former Executive Council of Puerto Rico on March 19, 1901, entitled 'A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica';

"Provided that this cancellation shall become effective June 30th, 1929. It is understood, furthermore, that in the meantime the parties in interest are at liberty to file any further petition which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the lake, as well as the plans of any other works, in order that this level may be permanently kept.

"This order was rendered with the unanimous vote of the commissioners. Let the parties be notified.

"San Juan, Puerto Rico, March 8th, 1929.

Miguel A. Munoz, President of the Commission. Attest: L. F. de Vizcarrondo."

[fol. 68] All of the above is known to the appellants.

Let this judgment be entered in the corresponding register of this court and let the necessary writs issue to make it effective.

San Juan, Puerto Rico, June 4, 1930.

Domingo Sepulveda, Judge.

IN DISTRICT COURT OF SAN JUAN

NOTICE OF APPEAL—Filed June 26, 1930

To the Clerk of the Court; to the Public Service Commission of Puerto Rico; to the Municipality of Lajas, P. R., and to the Attorney General of Puerto Rico, as Attorney for the Commission, and to Rafael V. Perez Marchand, Esq., as Attorney for the Municipality of Lajas, P. R.:

SIRS:

Please take notice that the plaintiffs, feeling aggrieved by the judgment rendered and entered in the above-entitled case of June 4, 1930, appeal therefrom to the Supreme Court of Puerto Rico.

San Juan, Puerto Rico, June 26, 1930.

O. B. Frazer, R. Castro Fernandez, Attorneys for the Plaintiffs.

Copy served this twenty-sixth day of June, 1930.

James R. Beverley, Attorney for the Public Service Commission.

I, R. Castro Fernandez, being duly sworn, depose and say:

That I am one of the attorneys for the plaintiff; that on this date I have deposited in the post office of this city an envelope, duly postpaid, addressed to Rafael V. Perez Marchand, Esq., Ponce, Puerto Rico, who is the attorney of record for the Municipality of Lajas, Puerto Rico, and that said envelope contained a true and faithful copy of the foregoing notice of appeal; that there exists a daily mail service between San Juan and Ponce.

San Juan, Puerto Rico, June 26, 1930.

R. Castro Fernandez.

[fol. 69] Sworn to and subscribed before me by R. Castro Fernandez, of full age, married, attorney at law, and resident of this city, to me personally known, this twenty-sixth day of June, 1930.

P. N. Colberg, Clerk, by P. del Manzano, Deputy Clerk.

[File endorsement omitted.]

IN DISTRICT COURT OF SAN JUAN

CERTIFICATE OF COUNSEL AND STIPULATION AS TO RECORD

We, O. B. Frazer and R. Castro Fernandez, attorneys for the petitioners-appellants; James R. Beverley, Attorney General of Puerto Rico, and M. Rodriguez Serra, Assistant Attorney General, attorneys for the Public Service Commission; and Rafael V. Perez Marchand, attorney for the Municipality of Lajas, Puerto Rico, do hereby certify:

That the foregoing is a true and faithful copy of the record before the District Court of San Juan in the present case, with the exception of Exhibits 1 to 7, inclusive, which were accompanied to the transcript of the evidence presented before the Public Service Commission, the same containing photographs, plans, etc., which may not be transcribed, for which reason the parties stipulate and agree that the originals thereof be transmitted to the Supreme Court. And in order that the appellants may perfect their apeal, we certify and subscribe these presents, in San Juan, Puerto Rico, this eleventh day of August, 1930.

O. B. Frazer, R. Castro Fernandez, Attorneys for the Petitioners-Appellants. James R. Beverley, Attorney General of Porto Rico; M. Rodriguez Serra, Assistant Attorney General of Puerto Rico, Attorneys for the Public Service Commission of Puerto Rico. R. V. Perez Marchand, Attorney for the Municipality of Lajas, Puerto Rico.

[fol. 70] IN SUPREME COURT OF PUERTO RICO

No. 5401

HORACE HAVEMEYER et als., Plaintiffs-Appellants,

v.

PUBLIC SERVICE COMMISSION OF PUERTO RICO and MUNICIPALITY OF LAJAS, Defendants and Appellees

Appeal from the District Court of San Juan

OPINION OF THE COURT, DELIVERED BY MR. JUSTICE ALDREY—San Juan, Puerto Rico, November 9, 1933

The civil agricultural partnership Russell & Company, Sucrs., S. en C., by its partners Horace Havemeyer and

others, as grantee of certain rights which the Guanica Land Company had in a franchise, appealed to the District Court of San Juan from a decree of the Public Service Commission of Puerto Rico canceling the said franchise, in so far as it referred to the right of taking a certain amount of water from Guanica Lake. The District Court affirmed this decree of the Commission and dismissed the appeal taken therefrom. Russell & Company appealed from that judgment to this court. The partnership based its appeal to the district court on Section 78 of Act No. 70 of 1917, the short title of which is "The Public Service Act of Porto Rico"; its appeal to this court being based on Section 90 of said law.

The above cited law provides that the District Court of San Juan, to which exclusive jurisdiction is granted, shall decide such appeals upon the record certified to it by the Commission: that the question to be determined is whether or not the order appealed from is reasonable, in conformity with the law and based on competent evidence: that in all such cases the orders of the Commission shall be prima [fol. 71] facie evidence of the reasonableness thereof; that the burden of proving the contrary shall be upon the appellant or appellants, and that if the court shall upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the Commission.

From a certified copy of the record of the Commission which was presented to the District Court and is now before us, the following appears:

The Executive Council of Puerto Rico granted in 1901 to the corporation Guanica Land Company, and to its grantees, franchise number 5, whereby it was authorized to construct a private railway over public lands and a wharf in the port of Guanica, and to use twenty million gallons of water daily from Guanica Lake for the proper irrigation of the lands owned or leased by it. We quote some of the clauses of this franchise, to wit:

"1. That the Guanica Land Company, (a corporation organized and existing under and by virtue of the laws of the State of New Jersey), and its successors and assigns be and they are hereby authorized and empowered to erect, construct, maintain and operate a dam of masonry work or

other proper materials across the Cano Negro, or outlet from the Lake of Guanica, in the Municipality of Yauco and upon such lands of abutting owners as may have been acquired by consent or by process of law, for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said lake, through the said Cano or otherwise, for the purposes hereinafter set forth.

"2. That the said Company and its successors and assigns be and they are hereby authorized to take from the said Lake of Guanica, or from the said cano or outlet, such quantity of water, not exceeding 20,000,000 gallons during each day, as shall be necessary or sufficient for the proper irrigation of the lands now or hereafter owned or leased by the said company, or by its sucecssors or assigns, or any [fol. 72] of them. The water so to be taken from the said lake or cano may be taken from such part or parts thereof, adjacent or contiguous to said lands, as the said Company or its successors or assigns may see fit, and may be taken by gravity through proper channels, or by pumps, or by any other method that may be advisable, or by any two or more of such methods.

"3. That the said company and its successors and assigns may erect, construct, operate and maintain upon those parts of the lands now or hereafter owned or leased by it or them, which lie within six meters of the bank of the said cano, or within twenty meters of the shore of the said lake or of the harbor or bay of Guanica, such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters; provided, that no public road lying within or partly within said limits shall be obstructed to any extent thereby.

"4. That nothing herein contained shall be held or construed to authorize or permit the said Company or its successors or assigns to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said lake, shall be borne by the said Company, *its waters of said lake, shall be borne by the said Company,* its successors and assigns and action for damage shall lie

against said company, it successors and assigns for such damage by such abutting owners, in any court of competent jurisdiction."

Twenty-seven years after said franchise was granted, the Municipal Assembly of Lajas adopted a resolution whereby it complained before the Public Service Commission and before the Commissioner of the Interior that the engineering works carried out in Cano Negro of Guanica Lake are causing irreparable damages to the Municipality [fol. 73] of Lajas by throwing the waters of Guanica Lake beyond its highest level, by invading municipal roads and by making the life of abutting neighbors and landowners in the wards of Costa and Plata impossible. In view of this complaint and after a certain investigation was made by the president of the Commission, the latter ordered that the holders of said franchise appear before the Commission to show cause why the same should not be canceled. The civil agricultural partnership Russell & Company appeared by its members Horace Havemeyer and others, as sole owners, by purchase, of that part of the franchise which refers to the use of the waters of Guanica Lake, objected to its cancellation or modification, and alleged also that the Commision lacked jurisdiction to cancel or modify the said franchise.

It appears, moreover, that Guanica Lake had a pond known as Negro or Los Negroes, 3,900 meters or 12,792 feet long, which connects it with the sea; that in 1928 this pond was entirely shut off for a length of three hundred meters, beginning from the lake, and that the remainder of the pond up to the sea was perfectly visible; that the bottom of the lake is higher than the level of the high tides of the sea: that there is in the valley of Lajas a place known as "El Anegado", the bottom of which is higher than that of the lake, and that there exists between El Anegado and the lake, which are two distinct bodies, a pond which connects them, known as "Angostura" or "Carril"; that El Anegado had been flooded several times prior to 1926 but had dried a few months later; that since the middle of 1926 and during the years 1927 and 1928 El Anegado has been flooded and has formed a single body with the lake, and that about four or five thousand acres of land and many private properties of considerable area are under water, some of them being absolutely flooded and others almost totally.

That from and after the year 1926 two municipal roads have been under water for about seven or eight kilometers; that diseases have increased in that region; that in the margins of Loco River, which flows in the lake near Negro Pond, works have been done to avoid its drainage; that the [fol. 74] government, the grantees or its successors have never determined what the ordinary level of the lake is; that while Negro or Los Negros pond is open El Anegado may be readily drained, and that water would still remain in the lake by reason of the difference in level existing between them, and that owing to the damages suffered by landowners, the holder of the franchise has granted the usufruct of certain properties to the landowners whose properties have been flooded.

When the Commission canceled the franchise on March 8, 1929, it ordered that the decree should become definitely effective June 30th of that year and that in the meantime the parties in interest be at liberty to file whatever new petition they deemed convenient for the use of the waters of Guanica Lake, by submitting to the Commission specific data as to the highest level of the waters of Guanica Lake, as well as the draft of any works, in order that said level might be permanently kept.

The claim of Russell & Company that the Commission lacks jurisdiction to cancel or modify the franchise was raised by the corporation South Porto Rico Sugar Company before the United States District Court for the District of Puerto Rico, when in an injunction proceeding it prayed that the said Commission be ref-rained from interfering in the case. This petition was denied and on appeal the United States Circuit Court of Appeals for the First Circuit said:

"On May 28, 1928, the Public Service Commission of Porto Rico issued to appellants an order of notice to appear on June 4, 1928, and show cause why said Commission should not cancel a franchise granted, on March 19, 1901, to appellants' predecessors in title, by the Executive Council of Porto Rico, to use daily 20,000,000 gallons of the waters of Lake Guanica for irrigation, for the construction and operation of a private railroad to run in part over lands subject to public rights, and to construct and maintain a dock on the Bay of Guanica. Without appearing be-

fore the commission, the appellants filed on June 2, 1928, a bill in equity seeking an injunction to restrain the Com- [fol. 75] mission from interfering in any way with the enjoyment of their powers under this franchise, and from asserting any jurisdiction over the appellants in respect to said franchise. The court below sustained a motion to dismiss filed by the Attorney General of Porto Rico, holding, in a well-reasoned and cogent opinion, both that the suit was premature and that the Public Service Commission had jurisdiction. This decision was right on both points.

"(1) Courts have no general supervisory power over such tribunals as public service commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon the property rights. American Coal Mining Co. v. Special Coal & Food Commission (D .C.), 268 F. 563; Sayers v. Montpelier & Wells River R. R., 90 Vt. 201, 97 A. 660, Ann. Cas. 1918 B, 1050.

"(2) If we assume for the moment that this Public Service Commission has no jurisdiction, the issuance of an order of notice was no such assertion of authority or threat of irreparable injury as to warrant injunctive interference by the court. It would not follow that, on appearance and argument, the commission would adhere to an erroneous view as to the nature and extent of its jurisdiction. The appellant's case in that regard is not supported by the cases relied upon by their learned counsel. Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570, and cases cited; Work v. Louisiana, 269 U. S. 250, 46 S. Ct. 92, 70 L. Ed. 259; Gallardo v. Porto Rico Light & Power Co. (C. C. A.), 18 F. (2d) 918; Benedicto v. West India & Panama Tel. Co. (C. C. A.), 256 F. 417.

"Affirmation of the decree below (dismissing the bill) would doubtless be warranted on this ground alone. But it is plainly in the interest of the parties that we deal now, rather than possibly in a later suit, with the fundamental question of the jurisdiction of the commission to maintain procedings looking to repeal, alteration or modification of the appellant's franchise.

[fol. 76] "Under the first Organic Act of Porto Rico—the Foraker Act of April 12, 1900, 31 Stat. 77, (48 U. S. C. A., Sect. 731 et seq.)—Congress provided for this recently acquired possession a legislative assembly, consisting of an

elective lower chamber, and, in lieu of a senate, an Executive Council, consisting of six heads of the executive departments, appointed by the President. At the end of the section 31 it was enacted:

" 'Provided, however, that all laws enacted by the legislative assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same.'

"Section 32 reads:

" 'That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to * * * repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof; Provided, however, that all grants of franchises, rights, and privileges or concessions of a public or quasi public nature shall be made by the executive council, with the approval of the Governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.'

"Franchises and laws were both thus required to be reported to Congress, which reserved power to annul either or both.

"Under the joint resolution of May 1, 1900, 31 Stat. 715, amending the Foraker Act of April 12, 1900, it was provided:

" 'That all franchises, privileges or concessions granted under section 32 of said act shall provide that the same shall be subject to amendment, alteration or repeal.'

"This was the familiar provision intended to meet the doctrine of the Dartmouth College Case. Pursuant to these [fol. 77] powers, the Executive Council the next year (1901) granted the franchise in question, providing in article XVIII 'that the franchises, privileges and concessions hereby granted shall be subject to amendment, alteration or repeal.'

"The same general power to annul laws enacted by the Legislature of Porto Rico is retained in section 34 of the Second Organic Act—the Jones Act of March 2, 1917, 39 Stat. 951. 48 U. S. C. A., Sect. 822 et seq. In thus reserv-

ing in both Organic Acts power to annul laws enacted and franchises granted by the Porto Rican government, Congress acted in close analogy to its long-continued practice with relation to territories within the boundaries of the present United States—prospectively states. Compare the Organic Act of Oregon, 9 Stat. 323, Sect. 6; of Minnesota, 9 Stat. 403; of New Mexico, 9 Stat. 446; of Utah, 9 Stat. 453; of Washington, 10 Stat. 172. The purpose obviously, both in Porto Rico and with our own territories, was to provide a quasi guardianship during a probative period, over a developing political society, by requiring full reports (itself a sobering check) of all important performances of the local government, and by reserving power to annul any act sinister or dangerously foolish, in origin or in effect.

"The new Organic Act substantially changed the form of government providing for an elected Senate, having, in general, the legislative powers previously exercised by the abolished Executive Council. Compare section 12. It also provided in section 38 for a Public Service Commission, and enacted:

" 'The said commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council. Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor, and shall be reported to Congress, which hereby reserves the power to annul or modify the same.' 48 U. S. C. A., Sect. 750:

[fol. 78] "Congress thus apparently vested full control over franchises, old and new, in the Public Service Commission.

"But the Jones Act also vested in the Porto Rican Legislature (compare sections 25 and 37) general legislative authority over all matters of a legislative character not locally inapplicable or inconsistent with the provisions of the Organic Act. Under this power, the Legislature, by Act No. 70, approved December 6, 1917 (Laws of Porto Rico, Vol. 2, pp. 432-546) Section 60, enacted:

" 'Section 60. Violation of existing franchises.—Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Exec-

utive Council and is now in force; Provided, however, That the commission shall have the power to alter, amend, modify, or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law.'

"(3) This law was of course reported to Congress and it has not been annulled. This has some tendency to show approval by Congress. Chuoco Tiaco v. Forbes, 228 U. S. 549, 558, 33 S. Ct. 585, 57 L. Ed. 960; Fajardo Sugar Co. v. Holcomb (C. C. A.) 16 F. (2d) 92, 96.

"It is thus clear, and appellants' learned counsel concedes, that the Jones Act or the Legislature of Porto Rico, or both together, vested in the Public Service Commission all powers over franchises originally vested in the Executive Council.

"(4) The appellants' contention of no jurisdiction in that commission, therefore, rests entirely on the proposition that Congress reserved to itself alone jurisdiction to repeal or amend franchises granted by the Executive Council. It grounds this proposition on the reservation contained in section 32 of the Foraker Act, supra: 'All franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.' Necessarily this contention also asserts the invalidity of that portion of section 60 of the Act of Porto Rico, No. [fol. 79] 70, approved December 6, 1917, supra, which explicitly provides that the Public Service Commission shall have the power to alter, amend or repeal franchises previously granted by the Executive Council.

"We cannot adopt this construction of the general reservation by Congress of the power to annul all franchises and laws of the experimental local government set up by Congress in Porto Rico. We are constrained to hold that the purpose of Congress was, experimentally and gradually, to vest in the Porto Rican government the general powers of state governments, subject to the reserved power to annul or modify franchises and laws if and when Congress sees fit. The reservations of the power to annul or modify franchises granted by the Executive Council is in the same general terms as the reservation of the power to annul all laws. It did not in 1901 exclude the power granted by fair and necessary implication to the Executive Council to

modify or repeal franchises granted by that Council. The like reservation contained in the Jones Act does not exclude or cut down the power of the Public Service Commission to repeal or alter franchises granted by it. Like the power to repeal statutes, the body that creates may alter or destroy the creation.

"The decree of the District Court is affirmed, with costs to the appellees in this court."

The first three errors assigned by the appellant as committed by the court below claim that the Commission has no authority, power or jurisdiction to cancel or modify the said franchise, and merely expound them without argument, inasmuch as this question has been decided by the Circuit Court of Appeals for the First Circuit, as we have already stated. We have examined the order appealed from and find that it is in accord with the law, for which reason we shall discuss some of the other grounds of the appeal.

It was neither claimed before the District Court nor before this court that the evidence admitted by the Commis- [fol. 80] sion in order to enter its decree is incompetent, for which reason the controversy is limited to a determination of whether such decree is reasonable or not and whether it is in accord with the law.

In order to attack the decree of the Commission and its affirmance by the court below, the appellant alleges in several of its assignments of error that clause four of the franchise does not impose on the appellant the duty to keep the water of the lake at a certain level, and that it is simply a clause explaining that the appellant is not authorized by the franchise to carry out any affirmative acts tending to raise or to keep the level of the waters of the lake higher than the customary level of same: that this clause does not clearly state that the appellant is bound to keep the level of the water at a certain height: that the franchise does not grant the appellant the exclusive power to use the waters of the lake, although it is true that there are no other persons taking great quantities of water therefrom, though one or two land owners use small quantities of water, but other concessions may be made; that there is no evidence whatever to show that the appellant has carried out any act tending to close Negro pond; and that although the pond was closed and eliminated, the Commission did not have the right to presume that the appellant is responsible of this

situation, unless it were shown that the appellant did something to create it and that according to the franchise it was its duty to avoid the same. The errors assigned by the appellant hinge on these questions.

Clause four of the franchise provides, as we have already seen, "that nothing herein contained shall be held or construed to authorize or permit the said company or its successors or assigns to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof during the rainy season." This clause not only prohibits the grantee from exceeding said level but it also compels the same to avoid the waters of the lake from exceeding said level, for which reason this franchise necessarily gave to the grantee and its successors the management and control of Negro Pond so as to regulate and maintain said [fol. 81] level and, consequently, the duty to carry out any acts necessary to keep such level.

It appears from the facts of this case that although there were some floods in El Anegado of Lajas prior to 1926, the same were not of the extent as the one now in question, and that the same lasted only a few months, while since the middle of 1926 and for over two years and up to the time in which the Commission decided this case, several thousand acres of land were still flooded, El Anegado and the lake constituting a single body of water, when they are two distinct bodies, although joined by the canal of La Angostura, through which the waters of the lake flow into El Anegado when they have a high level, all of this showing that it was the level of the lake, which was higher than the customary level of the water during the rainy season, that caused the flood. Neither the government nor the grantee or its successors have determined the level to which the franchise refers, but the natural and logical conclusion is that in view of the fact that Negro Pond is closed, the lake could not drain in the sea the excess of rain water, and this necessarily produced a level higher than the customary one during the rainy season and the continuous floods for several years of El Anegado of Lajas.

It is true that there is no evidence of any positive act on the part of the appellant to close Negro pond, but if the latter was closed, as it claims, by soil carried by the Loco River, it was in any event its duty to open the same in order that the waters of the lake might not produce, as they neces-

sarily produced when the outlet was closed, a level higher than the customary one, which produced the continuous flood of El Anegado. Consequently, we arrive at the conclusion that the order or decree of the Commission is reasonable and in accord with the law, inasmuch as appellant has failed to comply with the conditions of the franchise.

The judgment appealed from will be affirmed.

Pedro De Aldrey, Associate Justice.

[fol. 82] In Supreme Court of Puerto Rico

Judgment

San Juan, Puerto Rico, November 9, 1933.

For the reasons stated in the foregoing opinion the judgment appealed from rendered by the District Court of San Juan, June 4, 1930, is hereby affirmed.

It was so decreed by the court as witness the signature of the Chief Justice.

Mr. Justice Cordova Davila took no part in this ruling.

Emilio Del Toro, Chief Justice. Attest: Joaquin Lopez, Secretary-Reporter.

[Memorandum.—Petition for appeal and supersedeas, affidavit as to amount in controversy, order of December 28, 1933, allowing appeal, citation, issued January 2, 1934, and service thereof, supersedeas and cost bond and order of January 2, 1934, approving bond are here omitted.—A. I. Charron, Clerk.]

In Supreme Court of Puerto Rico

Assignment of Errors

Now come the plaintiffs-appellants herein, Horace Havemeyer, Frank A. Dillingham et al., as partners of the agricultural civil partnership Russell & Co., Sucrs., S. en C., and respectfully submit that in the record, proceedings, de-

cision and final judgment of the Supreme Court of Puerto Rico in the above-entitled case there is manifest error, to wit:

1. The Supreme Court of Puerto Rico erred in holding that the Public Service Commission of Puerto Rico had jurisdiction to cancel certain parts of franchise No. 5 granted by the Executive Council of Puerto Rico, March 19, 1901, to the Guanica Land Company, a private entity not connected in any way with the rendering of public service.

2. The Supreme Court of Puerto Rico erred in failing and refusing to hold that jurisdiction over franchise No. 5 [fol. 83] of March 19, 1901, granted to the Guanica Land Company (not a public company) lay exclusively with the Congress of the United States and/or with the Executive Council of Puerto Rico.

3. The Supreme Court of Puerto Rico erred in holding that clause 4 of franchise No. 5 granted to the Guanica Land Company by the Executive Council of Puerto Rico, March 19, 1901 imposed an affirmative obligation upon the grantee and its successors in right to regulate and control the level of Guanica Lake.

4. The Supreme Court of Puerto Rico erred in failing and refusing to hold that Russell & Co., Sucrs., S. en C., the successor of grantee of franchise No. 5, had complied with clause No. 4 of franchise No. 5 of March 19, 1901, in view of its other finding that Russell & Co. had done nothing to block the natural outlet of the lake and that the blocking of the outlet if it occurred was through the natural action of flood waters.

5. That court erred in failing and refusing to hold that its finding and the uncontradicted evidence submitted before the Public Service Commission to the effect that no standard or average high water mark was ever established by the Insular Government or by anyone by which clause 4 of franchise No. 5 could be judged, relieved the grantee and its successors of any positive duty to lower or raise the level of Lake Guanica.

6. The Supreme Court of Puerto Rico erred in holding that clause 4 of franchise No. 5 of March 19, 1901, neces-

sarily gave the grantee and its successors the control of the natural outlet of Lake Guanica to the sea.

7. The court erred in failing and refusing to hold that clause 4 of franchise No. 5 approved by the Executive Council of Puerto Rico, March 19, 1901, was a mere prohibitive clause, with which grantee and its successors have always strictly complied.

8. The court erred in holding that the order of cancellation of the water provisions of franchise No. 5, by the Publice Service Commission was reasonable, when the only penalty imposed by clause 4 of the franchise itself was the right of civil action given to abutting owners for damages caused by the undue raising or undue lowering of the waters of Guanica Lake.

[fol. 84] 9. The court erred in failing to hold that the order and decision of the Public Service Commission of Puerto Rico deprives Russell & Co., Sucrs., S. en C., of its property without due process of law in that the said order and decision arbitrarily and unreasonably imposed upon and read into the contractual franchise between the government of Puerto Rico and the owners of the franchise an affirmative duty to regulate and control the level of Guanica Lake.

10. The court erred in failing and refusing to hold that the reasonable interpretation of clause 4 of franchise No. 5 of March 19, 1901, merely forbade the grantee and its successors to erect dams or other obstructions which would result in raising the level of Lake Guanica above the usual level of the rainy season in ordinary years.

11. The Supreme Court of Puerto Rico erred in failing and refusing to hold that the Public Service Commission of Puerto Rico should have given an opportunity to the successors of the grantee of franchise No. 5 of March 19, 1901, to comply with the Public Service Commission's interpretation of clause 4 of the franchise before proceeding to the drastic remedy of cancellation.

12. The Supreme Court of Puerto Rico erred in not directing a modification of the order of the Public Service Commission giving successors of the grantee of franchise No. 5 of March 19, 1901, an opportunity to comply with the

interpretation put upon clause 4 of the franchise by the Public Service Commission of Puerto Rico and the District Court of San Juan, before depriving successors of grantee of a right of great value to them.

13. The Supreme Court erred in holding that the order of the Public Service Commission cancelling the franchise was reasonable when it does not appear from the record that appellants were given the opportunity to comply with the interpretation the Public Service Commission put upon clause 4 of franchise No. 5 of 1901 before resort was had to cancellation of a valuable right to take water, it appearing on the contrary that immediately upon receiving the interlocutory order of the Public Service Commission of [fol. 85] Puerto Rico to open the outlet of Lake Guanica appellants complied therewith.

14. The remedy is too drastic and unreasonable under the circumstances.

15. The judgment is contrary to law.

16. For other errors apparent in the record.

Wherefore plaintiffs-appellants pray that the judgment rendered by the Supreme Court of Puerto Rico on November 9, 1933, be reversed and set aside and for such other relief as may be proper.

San Juan, Puerto Rico, December 18, 1933.

Francis E. Neagle, R. Castro Fernandez, Attorneys for Plaintiffs-Appellants.

IN SUPREME COURT OF PUERTO RICO

STIPULATION AS TO RECORD ON APPEAL

The appellants and appellees through their undersigned attorneys respectfully stipulate and agree in accordance with Rule 14, subdivision 3, of the Rules of the United States Circuit Court of Appeals for the First Circuit and subject to the approval of this Honorable Court, that the record to be filed before the United States Circuit Court of Appeals for the First Circuit shall consist of the following portions of the record filed before this honorable tribunal, to wit:

1. Petition for appeal and its Exhibits A to H inclusive. (Supreme Court Record, pages 1 to 52, inc.)

2. Answer to the petition by the Public Service Commission. (Supreme Court Record, pages 93 to 98 inc.)

3. Answer to the petition by the Municipality of Lajas. (Supreme Court Record, pages 99 to 103 inc.)

4. Interlocutory order of the Public Service Commission dated December 17, 1928. (Supreme Court Record, pages 121 to 123, inc.)

[fol. 86] 5. Statement of the case and Opinion of the District Court of San Juan, P. R. (Supreme Court Record, pages 471 to 491, inc.)

6. Judgment of the District Court of San Juan, P. R. (Supreme Court Record, pages 491 to 494, inc.)

7. Notice of appeal filed in the District Court of San Juan, P. R. (Supreme Court Record, pages 495 and 496.)

8. Opinion of the Supreme Court of Puerto Rico.

9. Judgment of the Supreme Court of Puerto Rico.

10. Petition for appeal and supersedeas, affidavit of amount in controversy, assignment of errors, order allowing appeal and supersedeas, supersedeas bond and citation filed before the Supreme Court of Puerto Rico.

San Juan, P. R., January 9, 1934.

Francis E. Neagle, R. Castro Fernandez, Attorneys for Appellants. Benjamin J. Horton, Attorney General of Porto Rico; M. Rodriguez L. Serra, Assistant Attorney General, Attorneys for the Public Service Commission, Appellee. R. V. Perez Marchand, Attorney for the Municipality of Lajas, Appellee.

ORDER APPROVING STIPULATION

San Juan, Puerto Rico, January 20, 1934.

The above stipulation is hereby approved.

It was so ordered as witness the signature of the Chief Justice.

Emilio Del Toro, Chief Justice. Attest: Joaquin Lopez, Secretary-Reporter.

[fol. 87] Translator's Certificate omitted in printing.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] [Memorandum.—An order of enlargement of time for docketing case to, and including, March 13, 1934, is here omitted. A. I. Charron, Clerk.]

[fol. 89] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1934

No. 2905

HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs., S. en C.), Appellants,

v.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO ET AL., Appellees

Appeal from the Supreme Court of Puerto Rico

Before Bingham, Wilson and Anderson, JJ.

OPINION OF THE COURT—Filed January 10, 1935

WILSON, J.:

This is an appeal from a final judgment of the Supreme Court of Puerto Rico, affirming a judgment of the District Court of San Juan, dismissing an appeal by the appellants from an order of the Public Service Commission of Puerto Rico, and affirming the order of the Commission. This court has jurisdiction to review this case on either of two grounds: (1) that the construction of a United States statute, or (2) the necessary jurisdictional amount is involved. Municipality of Rio Piedras v. Serra, Gerabis & Co., Inc., 65 Fed. (2d) 691.

It is urged by counsel for the appellees that the individual appellants as members of the Sociedad en Comandita, Russell & Company, a form of limited partnership organized under the Code of Commerce of Puerto Rico

[fol. 90] (1930), Sec. 95, have no standing here as appellants, since the Supreme Court in People of Puerto Rico v. Russell & Company et al., 288 U. S. 476, held that it was a juridical entity, at least, for the purpose of giving the insular courts jurisdiction, it having its domicile in Puerto Rico. It is or no importance whether the individual members of Russell & Company are parties to this appeal.

The order to show cause was issued to "Russell & Company, S en C, a limited partnership." That company is here. Throughout the entire proceedings it has been designated as a civil agricultural partnership, or a limited partnership, as it appears it is, Secs. 125, 156 of the Commercial Code, Civil Code (1930) Sec. 1590, and every order and judgment has been against it in that capacity. It is too late now to raise the point. Russell & Company as a Sociedad en Comandita, having been proceeded against and consented to be treated in the proceedings as a civil agricultural partnership, we think it may be considered bound by whatever judgment may be rendered.

The facts found by the Supreme Court, briefly stated, are as follows: The Executive Council of Puerto Rico in 1901 granted to the Guanica Land Company, a New Jersey corporation, and its assigns, a franchise whereby it was authorized to take 20,000,000 gallons of water daily from Guanica Lake, but solely for the proper irrigation of lands owned or leased by it.

More particularly the franchise provides:

"I. That the Guanica Land Company, (a corporation organized and existing under and by virtue of the laws of the State of New Jersey), and its successors and assigns, be and they are hereby authorized and empowered to erect, construct, maintain and operate a dam of masonry work or other proper materials across the Cano Negro, or outlet from the Lake of Guanica, in the Municipality of Yauco and upon such lands of abutting owners as may have been acquired by consent or by process of law, for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said Lake, through the said cano [fol. 91] or otherwise, for the purposes hereinafter set forth.

II. That the said Company and its successors and assigns be and they hereby are authorized to take from the said Lake of Guanica, or from the said cano or outlet, such quantity of water not exceeding 20,000,000 gallons during each day, as shall be necessary or sufficient for the proper irrigation of the lands now or hereafter owned or leased by the said Company, or by its successors or assigns, or any of them. The water so to be taken from the said lake or cano may be taken from such part or parts thereof, adjacent or contiguous to said lands, as the said Company or its successors or assigns may see fit, and may be taken by gravity through proper channels, or by pumps, or by any other method that may be advisable, or by any two or more of such methods.

III. That the said Company and its successors and assigns may erect, construct, operate and maintain upon those parts of the lands now or hereafter owned or leased by it or them, which lie within six meters of the bank of the said cano, or within twenty meters of the shore of the said lake or of the harbor or bay of Guanica, such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters; provided, that no public road lying within or partly within said limits shall be obstructed to any extent whatever thereby.

IV. That nothing herein contained shall be held or construed to authorize or permit the said Company or its successors or assigns to raise or maintain the level of the waters of said Lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said lake, or by unduly lowering the level of the waters of said lake, shall be borne by the said Company, its successors and assigns and action for damages shall lie against said Company, its successors and assigns for such damage by such abutting owners, in any court of competent jurisdiction."

It also authorized the Guanica Land Company to construct a private railroad for the transporting of its own products to a private wharf in Guanica Harbor, which it was authorized to construct, having first obtained permission of the Secretary of War.

[fol. 92] It appears in the record of the proceedings that at some time prior to 1917, the Guanica Land Company assigned the entire franchise to the Guanica Central, which afterward assigned it to the Ensenada Estates, Inc., which assigned to Russell & Company that part of the franchise authorizing the taking of 20,000,000 gallons of water daily from Guanica Lake; that is, "to be more specific, the rights contained under paragraphs I to IV, inclusive, of said franchise."

In 1929 the Municipality of Lajas in Puerto Rico adopted a resolution which it forwarded to the Public Service Commission of Puerto Rico, complaining that by reason of engineering work carried on in Negro Pond, which is the outlet of Guanica Lake, the lands and public roads in the Municipality of Lajas had been flooded for a long period of time. The Governor of Puerto Rico also called the attention of the Commission to the flooded condition of the lands in Lajas by forwarding a letter from the Commissioner of the Interior, in which it is claimed that the increased volume of water in the lake was due to a violation of the terms of the franchise granted to the Guanica Land Company in 1901.

Upon these complaints the Commission issued a show cause order to Russell & Company, the Ensenada Estates, Inc., and the Guanica Central, and any other person or legal entity having any rights in the above franchise, to appear and show cause why the franchise granted to the Guanica Land Company in 1901 should not be cancelled.

The South Porto Rican Sugar Company, a domestic corporation of Puerto Rico, apparently having acquired rights under the franchise to the railroad and wharf and Russell & Company as a Sociedad en Comandita, appeared specially and filed a motion to dismiss the proceedings before the Commission on the following grounds:

"1. That the Public Service Commission lacks jurisdiction over this case and that it does not have jurisdiction to cancel the franchise mentioned in the order to show cause issued by the Commission on May 26, 1928.

[fol. 93] 2. That none of the parties appearing in this cause is a public service corporation or a public service partnership, or is engaged in any manner in public service, and that this Commission does not have jurisdiction over these parties or over any one of them."

The motion was denied and, after hearing, the Commission issued its order that so much of the franchise issued to the Guanica Land Company which refers to the taking of water from Guanica Lake for purposes of irrigation should be cancelled, but to take effect nearly four months later. The order provided that in the meanwhile the parties in interest would be permitted to file further petitions requesting the Commission to fix the highest point at which the waters of Guanica Lake could be maintained by owners of the franchise, which, of course, they could not do without conceding the jurisdiction of the Commission, which they still deny.

From this order Russell & Company appealed to the District Court of San Juan, assigning as errors by the Commission: (1) that the Commission was without jurisdiction in the premises, since neither the Guanica Land Company nor the civil agricultural partnership, Russell & Company, was a public or quasi public corporation, and the franchise granted was entirely of a private nature and its amendment, modification or cancellation was not within the powers vested in the Commission under Sec. 38 of the Organic Act of 1917; (2) that the Commission erred in not holding that the floods in the valley of Lajas were caused by torrential and extraordinary rains, or a vis major; (3) that the Commission erred in holding that any work done by Russell & Company within the bed of the Rio Loco contributed to the height of the waters in Guanica Lake; (4) that the Commission erred in holding that Russell & Company was bound to know the natural level of the waters in the lake, above which they should not permit the waters of the lake to be raised, except in case of extraordinary rains. These and many other errors were assigned on appeal to the District Court of San Juan. The District Court, how- [fol. 94] ever, held that the issues before it on the appeal were confined to (1) whether the Commission had jurisdiction and authority to make the order cancelling so much of the franchise as related to the taking of water from Guanica Lake; (2) whether the order of the Commission was based on competent evidence; and (3) whether the order cancelling so much of the franchise as authorized the taking of water from the lake was reasonable.

The jurisdiction of the Commission, the District Court held, was established by the opinion of this court in South

Porto Rico Sugar Company et al v. Munoz et al., 28 Fed. (2d) 820, in which the South Porto Rico Sugar Company as one of the parties interested and appearing before the Commission, sought an injunction to restrain the Commission from acting on the complaint of the Municipality of Lajas at all.

The District Court of San Juan further held that, as the order of the Commission was presumptively reasonable, it must be sustained unless clearly shown to be unjust and unreasonable; and after a consideration of the evidence before the Commission, the District Court held that the order was both reasonable and in conformity to law.

From this judgment Russell & Company appealed to the Supreme Court of Puerto Rico, which affirmed the judgment of the District Court.

The assignments of error on the appeal to the Supreme Court of Puerto Rico are not printed in the record, but from the opinion of the court it appears that the same issues were raised in that court as were raised in the District Court, viz.: (1) that the Commission was without jurisdiction to order the cancellation of the franchise as to the water rights in Guanica Lake; (2) whether it was based on competent evidence; and (3) was reasonable.

The issue of jurisdiction was also disposed of in the Supreme Court as settled by the opinion of this court in South [fol. 95] Porto Rico Sugar Company et al. v. Munoz et al., supra. As no question was raised as to whether the order of the Commission was based on incompetent evidence, the Supreme Court held that the issues before it were limited to the reasonableness of the order, whether it was supported by the evidence and whether it was in conformity to law.

Before the Supreme Court, counsel for the appellants contended that neither Clause I nor Clause IV of the franchise granted to the Guanica Land Company imposed on the grantee the positive duty to maintain the waters of the Lake at or below a certain level, when it was provided in Clause I that it might construct a dam at the outlet of the Lake, and in Clause IV that nothing contained in the franchise should be construed to authorize or permit the grantee or its assigns to raise or maintain the waters of the lake above the customary level thereof during the rainy season; and contended that it had done nothing that would cause the

level of the waters of the lake to be raised above such customary level.

The Supreme Court, however, held that: "This clause (IV) not only prohibits the grantee from exceeding said level, but it also compels the same to avoid the waters of the lake from exceeding said level, for which reason this franchise necessarily gave to the grantee and its successors the management and control of Negro Pond so as to regulate and maintain said level, and consequently, the duty to carry out any acts necessary to keep such level."

While the Supreme Court found that there was no evidence that the appellants did any positive acts to close the outlet, it did hold that if the outlet to Guanica Lake had become closed by soil carried down by the Loco River, which it appears the Commission found that the appellants improved so as to produce a greater flow of water into Guanica Lake, it was the duty of the appellants to open the outlet in order to lower the level of the lake in times of excessive rains. [fol. 96] It concluded that the order of the Commission was reasonable and in conformity to the law.

It is from these rulings that the appeal was taken to this court. The assignments of error may be summarized under three groups:

(1) That the Commission was without jurisdiction and authority to make the order cancelling the franchise; (2) that the Supreme Court erred in construing Clause IV of the franchise as imposing on the appellants any affirmative duty to lower the flood waters of the lake, and (3) that the order cancelling the franchise was not reasonable.

The contention of the appellants as to the jurisdiction of the Public Service Commission is that that Commission had jurisdiction only over public service corporations; that Russell & Company is not a public service corporation and therefore the Commission was without jurisdiction or authority to cancel the franchise it held. The jurisdiction and authority of the Public Service Commission to cancel the franchise in question was raised at the very threshold of these proceedings, and was considered and passed upon by this court in South Porto Rico Sugar Co. et al. v. Munoz, 28 Fed. (2d) 820. We are content to abide by the decision there made as to the jurisdiction of the Commission.

In the Munoz case (in which Russell & Company, S en C, was also a party plaintiff and the Public Service Commission a party defendant), and apparently throughout this entire litigation, it was and has been assumed without question that the right to take waters from Guanica Lake and Cano Negro to the extent of 20,000,000 gallons per day, and to erect pumping stations and canals, and for that purpose acquire by eminent domain private lands, was of a public or quasi public nature and could not be exercised by Russell & Company in the absence of such a grant, either from the Executive Council or its successor, the Public Service Commission. This assumption was unqualifiedly approved in [fol. 97] the brief of the appellants filed in the Munoz case and also in this case, where counsel, in speaking of the irrigation franchise, stated that "the grantee (Russell & Company) could not make use of the water in question (except by prescriptive right), even though it owned the land on both sides of the Cano Negro and the Lake of Guanica, without getting a concession from the Government of Puerto Rico, for the waters of lakes and rivers are of the public domain (Law of Waters, Revised Statutes and Codes of Porto Rico, Section 2390, p. 459)"; that is, that the waters of Cano Negro and of Guanica Lake are public waters. This being so the grant of the right to take the waters now held by Russell & Company was a grant of a franchise of a public or quasi public nature within the meaning of Sec. 32 of the Foraker Act (31 Stat. p. 83), Sec. 3 of the Joint Resolution of Congress of May 1, 1900 (31 Stat. p. 715; Laws of Porto Rico, 1916, p. 17; and Secs. 38 and 39 of the Jones Act (39 Stat. p. 964); and this is so even though Russell & Company is not a public service corporation, for in the matter of holding back and taking waters from these sources, it is exercising a function of a public or quasi public nature.

If this were not so, the errors assigned and the questions argued as to the jurisdiction and power of the Public Service Commission to revoke the concession, or any of the other questions sought to be raised, would be purely academic and unworthy of any consideration, for neither the Executive Council nor the Public Service Commission would have authority to grant such a concession, and Russell & Company would have acquired nothing by the grant and there would be nothing to revoke.

This view of the question of the public nature of the grant is recognized in Sec. 52 of the Act of the Legislature of [fol. 98] Puerto Rico of December 6, 1917 (Act No. 70, Laws of Porto Rico, 1917, Vol. 2, p. 512), where it says:

"The commission shall have power to grant franchises, rights, privileges or concessions for public or quasi public purposes, including the right * * * to grant franchises, rights, privileges or concessions for the use of public waters for public or private purposes; * * *"

And in this aspect it is of no consequence whether Russell & Company is or is not a public service corporation.

Furthermore, the sentence in Sec. 38 of the Jones Act, out of which to a large extent this discussion arises—"The said commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council,"—does not refer to such executive functions as having been conferred by an Act of Congress over public service corporations, as neither the Foraker Act, nor the Joint Resolution, nor any law of Congress called to our attention, expressly conferred any such functions upon the Executive Council. While it may have related to the executive functions impliedly conferred on the Executive Council by the Joint Resolution of 1900, it may well have referred to the executive functions conferred on the Executive Council relating to public service corporations under the Act of March 12, 1908, entitled "An Act concerning the Regulation of Public Service Corporations in Porto Rico." See Revised Statutes and Codes of Porto Rico, pages 72-79, and particularly Secs. 3-10. Sec. 6 of that Act, as amended (Act of March 9, 1911, at p. 115) provides:

"Whenever in the case of any public service corporation operating under a grant of any character whatsoever, any power has been reserved to the government or to any official authority or public body, whether such government, public body or official now is in existence or exercises authority in the Island of Porto Rico or not, to exercise any supervision or control over said corporation or to approve of any tariff of charges, rule or regulation or condition or operation, or to amend, alter or repeal any such grant, then this power shall, on and after the date of passage of this act, be deemed [fol. 99] to be vested in the Executive Council; and said

Executive Council shall have all the powers heretofore so reserved to any government public body, or public official, and when, in such grant or grants, conditions have been imposed upon the grantee, and such conditions have not been faithfully observed or hereafter may not be faithfully observed, the Executive Council shall have power to annul or repeal said grant, or to take such other action as in its opinion is proper in respect to the matter, provided such conditions shall not have been fully complied with within the reasonable time allowed therefor."

It thus appears that in Sec. 38 of the Jones Act of March 2, 1917, Congress expressly recognized the power of the legislature of Puerto Rico to legislate with reference to the enforcement of a grant of a franchise for public service corporations; and, if the legislature of Puerto Rico had the right to enact such legislation, there can be little doubt but that it had authority to enact Sec. 60 of Act 70, of December 6, 1917, in which it was provided:

"Section 60—Violation of existing franchises—Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Executive Council and is now in force; provided, however, that the (Public Service) commission shall have the power to alter, amend, modify or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law."

At least, Congress does not appear to have questioned it when the enactment of the law was reported to it.

And, inasmuch as the legislature of Puerto Rico, under the authority granted to it in the Organic Act (39 St. L. Sess. 25, 37) was authorized to enact legislation looking to the enforcement of the provisions of the Organic Act relating to franchises and not inconsistent therewith, whether the grantee thereof be an individual, a juridical entity, or a public service corporation, there can be no reasonable doubt as to the jurisdiction and authority of the Public Service Commission, at least, to alter or amend the franchise in question, when reasonable grounds are shown to exist, and that the amendment of March 4, 1927 [fol. 100] (c. 503, s. 6, 44 Stat. 1420) to Sec. 38 of the Organic Act of 1917, purporting to confer upon the legislature

power to enact such legislation, was enacted by Congress out of abundant caution.

We are of the opinion that, under the circumstances and upon the facts found by the Commission and accepted by the Supreme Court as a basis for its opinion, there was neglect on the part of the appellants to act when it became evident that the waters of the lake were being held up beyond the customary level by the conditions that had arisen in Negro Pond, over which they had control, especially when by their improvements in the Rio Loco a large quantity of silt and refuse, as the Commission found, was deposited at the outlet of the lake, and a greater volume of water was emptied in the lake in case of heavy rains than previously.

While they did not do any acts with the deliberate intent of holding back the waters of Guanica Lake above their natural level, they must, in 1926 or 1927, have been aware that, as a result of the accumlation of debris and sediment, an artificial dam had been raised at the outlet of the lake, and that the waters of the lake were thereby raised and maintained during the years 1927, 1928 and 1929 at a higher level than was customary following even unusual seasonal rains. With the knowledge of these facts, they permitted the artificial dam to remain, which accomplished the same purpose as a masonry dam created by their own acts. We think it was not unreasonable for the Supreme Court to find that the appellants had knowingly permitted the artificial dam thus created to remain, since they had control over Negro Pond and the outlet of the lake; and in thus permitting it to remain and to raise and keep the waters of the lake above the customary level, their action was unauthorized under the franchise granted to them, especially as they had by positive acts increased the flow of water, silt and refuse into the lake via the Loco River.

[fol. 101] Counsel for the Commission contends that the reasonableness of the order is not open for consideration by this court, although it is expressly made an issue before the insular courts under Sec. 85 of the Public Service Act of Puerto Rico. The cases cited by counsel are not in point, of which Keller et al., constituting the Public Utilities Commission of the District of Columbia v. Potomac Electric Power Company et al., 261 U. S. 428, is an example. In this case the District of Columbia courts were vested

with the power, after considering the order of the Commission, to amend it, to enlarge the valuations and to increase the rates established by the Commission. Obviously, a legislative power to fix rates was there vested in the court, and its acts in so doing were not judicial but legislative; and from its decision no appeal could lie to the Federal Supreme Court, which can only consider judicial questions.

The Public Service Act of Puerto Rico vests no legislative or executive powers in the insular courts under Sec. 85 of the Act. The District Court of San Juan on appeal has no power to change the order of the Commission. If it is not reasonable, or does not conform to the law, or is based on incompetent evidence, it can only reverse, or in its discretion remand, it to the Commission, which alone has the legislative or executive power to change it.

The Supreme Court in the case of Pacific Tel. & Tel. Co. v. Kuykendall, Director, etc., 265 U. S. 196, made clear this distinction. In that case two sections of the statutes of the state of Washington were involved, each differing in the powers vested in its court. Under Sec. 10428 (Comp. Stat. 1922) in case of an order of its Commission fixing rates, on appeal to the court for the purpose of having its reasonableness and lawfulness determined, the court could, as under the Puerto Rico Public Service Act, only affirm, reverse or remand. The court said, p. 200:

[fol. 102] "It is clear that the function to be performed by the Superior Court under this section is judicial. It does not fix rates or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks to the reasonableness and lawfulness of the order of the Commission, and is to determine whether evidence which should have been received was rejected, and in that case is to send the case back to the Commission for a new order. The court does not act legislatively."

While under Sec. 10441 of the Comp. Stat. (1922) of Washington, in fixing the valuation of utility properties, the state court is also made a part of the valuation tribunal and can pass on the weight of the evidence and set aside the valuation of the Commission and make a new one. In such case the Supreme Court said, p. 202:

"It is clear that the function of the courts in fixing the valuation of the property of the public utility is not confined to a judicial review of the work of the Commission."

It is clear, we think, that under the Public Service Act of Puerto Rico, the insular courts on appeal from the Puerto Rican Commission act judicially in determining whether its orders are reasonable, are in conformity with the law, and are based on competent evidence; and the same issues, on appeal from the Supreme Court of Puerto Rico, may be raised in this court.

Under the circumstances disclosed by the record, the absolute cancellation of that part of the franchise pertaining to the use of the waters of the lake would, in our opinion, be an arbitrary and unreasonable act, if it involved, as it may have, a taking of a valuable property right acquired by the appellants under the franchise, viz: the right to take 20,000,000 gallons of water daily from Guanica Lake. See Shields v. Ohio, 95 U. S. 319; Berea College v. Kentucky, 211 U. S. 45, 57; Fair Haven & Westville R. R. Co. v. New Haven, 203 U. S. 379, 388; Com. of Inland Fisheries v. Holyoke Water Power Co., 13 Gray 239; Chicago, Milwaukee & St. Paul Ry. Co. v. State of Wisconsin, 238 U. S. 491. To avoid future damages from flowage of lands [fol. 103] in Lajas, it was only necessary to amend or modify the franchise by requiring the establishment of a gauge above which the waters should not be permitted to be raised by the owner of the franchise, except during periods of extraordinary rains, and for a period sufficient to permit the excessive waters to be reduced in due course to the height of the gauge so established. The appellants in their answer before the Commission set forth—without admitting any obligation so to do—that they had already taken proper steps to lower the waters of the lake, and to guarantee that in the future the waters would not go beyond the customary level. The establishing of a maximum height to which waters may be impounded is a comparatively simple thing to do, and a common requirement, where rights of flowage are obtained, and is in accord with the obvious spirit and intent of the grant in this case.

While it was, no doubt, with this in mind that the Commission postponed the taking effect of its order, which carried with it the implication that it would agree to an

amendment of the franchise requiring the waters of the lake to be maintained at or below a certain level, except during the periods of excessive rains, which alteration or amendment we think it had power to make; and while we cannot assume, notwithstanding the delay caused by the appeals, which we think were taken in good faith, that the Commission will not act in fairness to the appellants in allowing an amendment or modification of the franchise and grant a further extension of time in which they may file a petition requesting and consenting to an amendment to the franchise imposing a reasonable limitation on the height at which the waters of the lake may be maintained, we nevertheless think a proper procedure in this case will be to reverse the judgment of the Supreme Court. The Commission may then proceed upon the evidence before it, and upon further investigation, establish a reasonable limitation upon the height at which the waters of the lake may [fol. 104] be maintained, and amend the franchise of the appellants, so as to restrict their right to hold the waters back under normal conditions at a higher level than the height so fixed. From the record in this case it is apparent that the appellants and the Commission will be able to agree on a definite level to accomplish this purpose.

The judgment of the Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion, but without costs.

RECITAL AS TO HEARING

[fols. 105 & 106] On October 18, 1934, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the tenth day of January, A. D. 1935, the *the* opinion of the court (page 89) was filed, and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—January 10, 1935

This cause came on to be heard October 18, 1934, upon the transcript of record of the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now, to wit, January 10, 1935, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is reversed and the case is remanded for further proceedings not inconsistent with the opinion passed down this day, but without costs.

By the Court: Arthur I. Charron, Clerk.

RECITAL AS TO ISSUANCE OF MANDATE

Thereafter, to wit, on February 11, 1935, mandate issued to the Supreme Court of Puerto Rico.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI—Filed April 4, 1935

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of Sixty (60) days from April 10, 1935.

Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

Dated this 4th day of April, 1935.

[File endorsement omitted.]

[fol. 108] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,669. U. S. Circuit Court of Appeals, First Circuit. Term No, 115. The Public Service Commission of Puerto Rico, Petitioner, vs Horace Havemeyer, et al. Petition for a writ of certiorari and exhibit thereto. Filed June 8, 1935. File No. 115, O. T. 1935.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 115

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
Petitioner,

vs.

HORACE HAVEMEYER ET AL. (Russell & Co., Suers., S. en C.),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND SUPPORTING BRIEF

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Rufus H. Darby Printing Co., Inc., Washington, D. C.

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(a) In any event the question of the "*reasonableness*" of the order of the Public Service Commission is one of local law, —or a mixed question of fact and of local law,—in which neither this Court nor the Circuit Court of Appeals will ordinarily interfere, but will ordinarily follow the decision of the Territorial Supreme Court, unless it is "clearly erroneous" 28-29

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 115

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
Petitioner,

VS.

HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs., S. en C.),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Public Service Commission of Puerto Rico, prays a Writ of Certiorari to review the final decision and judgment of the Circuit Court of Appeals for the First Circuit, January 10, 1935, in the above case reversing the judgment of the Supreme Court of Puerto Rico which had affirmed that of the insular District Court of San Juan in this case affirming the unanimous order of the Public Service Commission (R. 29-30, 67) repealing

"that part of franchise No. 5 which refers to the use of certain water of Guanica Lake for purposes of irrigation, granted by the former Executive Council of Puerto Rico on March 19, 1901, entitled 'A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica';

"Provided that this cancellation shall become effective June 30th, 1929. It is understood, furthermore, that in the meantime the parties in interest are at liberty to file any further petition which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the Lake, as well as the plans of any other works, in order that this level may be permanently kept."

The time for petitioners to apply for a Writ of Certiorari was extended sixty days by order of Mr. JUSTICE BRANDEIS until June 9, 1935 (R. 107).

QUESTIONS PRESENTED

The principal question here involves the scope of the "judicial power of the United States" under Article III of the Constitution.

Does the judicial power extend to the review by a constitutional court of the United States of the "reasonableness" of an order of a public service commission repealing a public utility franchise in accordance with a clause in the original franchise accepted by the grantee expressly reserving the power to repeal it, inserted in the franchise pursuant to a requirement of an Act of Congress?

Another question is whether the six individual respondents here,—the appellants in the Circuit Court of Appeals,—are parties in interest entitled to maintain an appeal from the order of the Public Service Commission of Puerto Rico, and particularly to maintain an appeal from

the insular Supreme Court to the Circuit Court of Appeals, in the absence of the corporate entity, the *Sociedad en Comandita,* Russell & Co., Sucrs., S. en C., which alone appears to claim any title to the franchise involved.

STATEMENT

On March 19, 1901, the former Executive Council of Puerto Rico granted a franchise to the Guanica Land Company of New Jersey for the construction, maintenance and operation of

> "a dam of masonry work or other proper materials across the Cano Negro, or outlet from the Lake of Guanica, * * * for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said Lake, through the said Cano or otherwise, for the purposes hereinafter set forth" (Par. I, R. 9-10),

and to take therefrom not exceeding 20,000,000 gallons of water a day for the irrigation of its own lands, to

> "be taken by gravity through proper channels, or by pumps, or by any other method that might be advisable, or by any two or more of such methods" (Par. II, R. 10),

and permitting the company or its successors or assigns to construct, operate and maintain on those parts of its lands lying

> "within six meters of the bank of the said Cano or within twenty meters of the shore of the said Lake or of the harbor or bay of Guanica, such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters" (Par. III, R. 10),

but providing that no public road should be obstructed, and (Par. IV, R. 10-11):

> "That nothing herein contained shall be held or construed to authorize or permit the said Company or its successors or assigns to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said Lake, shall be borne by the said Company, its successors and assigns and action for damages shall lie against said Company, its successors and assigns for such damage by such abutting owners, in any court of competent jurisdiction";

and authorizing the company also to construct, maintain and operate a line of standard gauge railway within six meters of the bank of the Cano or within twenty meters of the shore of the Lake of Guanica or of the harbor or Bay of Guanica for the transportation only of the company's own property and of its agents and employees, and also to construct and operate and maintain a dock or wharf in the harbor or Bay of Guanica likewise only for the company's own purposes, and not for hire; and providing also that (Par. XI, R. 13)

> "the said Company and its successors and assigns are hereby authorized to construct and maintain such other works as may be necessary for the proper operation of the said dam, channel, pipe lines, pumping stations, railway and wharf or dock or any of them";

but requiring the company to allow the use of the railway and wharf to the Federal and Insular Governments without compensation; giving it the power of eminent domain (Par. XIII, R. 13); and specifically requiring also that (Par. XIV, R. 13-14):

"Before any of the work herein authorized shall be begun, the plans for the same shall be submitted to and approved by the Commissioner of the Interior for the Island of Porto Rico, and all material and construction shall be subject to inspection by him and his agents. After such plans shall have been approved by the said Commissioner no material change or modification shall be made therein, unless the same shall be authorized or directed or approved by the Executive Council, or by the said Commissioner or his agents";

requiring formal written acceptance within ninety days and that the work be begun within sixty days and completed within one year (Par. XV, R. 14); and prohibiting the company from using water from the Lake for irrigation of any except its own lands (Par. XXI, R. 15); reserving to the Executive Council (Par. XXII, R. 15)

"the right at any time * * * to declare the said Company, its successors and assigns, a common carrier with respect to said railroad and wharf";

providing further that (Par. XVIII, R. 15)

"in accordance with Section 3 of Public Resolution No. 23, approved May 1st, 1900, it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal";

and that (Par. 17, R. 14)

"The franchises, concessions, rights and privileges hereby granted, or any one or more of them, may be assigned and transferred in whole or in part by the said Guanica Land Company, and by its successors and assigns, and it and they may grant license in respect thereto, every such assignee and licensee, unless otherwise provided by the instrument of assignment or grant, shall succeed to and acquire all the rights, liberties, privileges, power and authority herein granted or conferred upon the said Company, and shall also be bound by and obligated to the observation and per-

formance of all terms, conditions, agreements and stipulations herein contained, so far as the same are applicable to such assignment or grant."

By Section 38 of the Organic Act of 1917 (Act of March 2, 1917, c. 145, 39 Stat. 964) the powers of the Executive Council in relation to franchises were transferred to the Public Service Commission created by that act; and by Section 55 of the "Public Service Act of Puerto Rico", Act No. 70, December 6, 1917, it was provided that (Laws of Puerto Rico, 1917, Vol. II, p. 514):

> "No sale, transfer, purchase, acquisition, taking or holding, either in absolute ownership or in pledge, directly or indirectly, of any franchise, right, privilege or concession granted for public or quasi-public uses, shall be effective until approved by the commission."

The Guanica Land Company, original holder of the franchise, assigned it to the Guanica Centrale; and that assignment was approved by the Executive Council on October 31, 1901 (R. 17). The latter company "was extinguished" (R. 17) on June 30, 1917; and it does not appear that any assignment of the franchise by it to anyone was ever approved or authorized by the Executive Council or the Public Service Commission; but under date of July 18, 1917, Ensenada Estates, Inc., petitioned the Commission for approval of an assignment to "the limited partnership of Russell & Company", but approval was denied on January 13, 1918 (R. 17). Russell & Company, Sucrs., S. en C., *sociedad en comandita,* "a civil agricultural partnership organized in accordance with the laws of Puerto Rico" (Answer of Russell & Company, Sucrs., S. en C., to the Commission's Order to Show Cause, R. 26), now claims (*answer, supra,* Par. I; R. 26-27);

> "That on or about the 15th day of March, 1917, the corporation Guanica Centrale, which at the time was the owner of the franchise to which the order to show cause herein refers, assigned and granted for value

> received to the corporation Ensenada Estates, Inc., a corporation of the State of Connecticut, **all of that part of said franchise and of the rights therein contained, referring to the use of certain waters of Guanica Lake for purposes of irrigation, that is to be more specific, the rights contained under paragraphs I and IV, inclusive of said franchise**; and that subsequently, v.g., on or about the 29th day of June, 1917, the said corporation Ensenada Estates assigned and **granted for value received to the partnership appearing herein, the above mentioned part of said franchise, and that this partnership is at present the owner of all that part of said franchise having to do with the use of water for purposes of irrigation**; that the said assignments or grants were communicated to the Executive Council of Puerto Rico and to the Public Service Commission, and although it is true that they were not approved by said Council and Commission, such approval was unnecessary for their validity inasmuch as the franchise itself authorizes its assignment or grant."

Neither the Guanica Land Company, the original grantee, nor Guanica Centrale, nor Ensenada Estates, Inc. nor Russell & Company, ever complied with the provisions of Section XIV of the franchise requiring as above stated that detailed plans be submitted for the approval of the Commissioner of the Interior before beginning any work under the franchise (R. 13-14; R. 18). Russell & Company admits, in effect, in the last three lines of Paragraph II of its answer to the rule to show cause (R. 27) that no plans were ever submitted; but nevertheless it and its predecessors have taken the 20,000,000 gallons a day of water from the lake to irrigate their lands, and (Russell & Company's *answer, supra* Par. 4; R. 28);

> "in accordance with the provisions of said franchise, this partnership and the former owners of the franchise have spent great sums of money in pipes, pumps, canals and other works for taking and using the water of Guanica Lake";

and in some way the outlet to the Lake has become obstructed so that the former outlet at the head of the Cano Negro, *lying wholly on lands under the control of Russell & Company, the present claimant of the franchise* (Commission Report, R. 36), has become wholly dry land for a distance of some 300 meters (about a thousand feet) from the foot of the Lake, "close to the Lake", "and that after this distance the bed of the old pond" ("Los Negros" or "Cano Negro") "could be seen" (R. 36). That is to say, there is what amounts to a dam, about a thousand feet in width, across the outlet of the Lake into the pond; and (Commission's findings, "Report", R. 36):

> "These lands were under the control of the respondents" (Russell & Co.) "and it was in their own interests to keep the level of the lake as high as possible in order to have a sufficient amount of water so as to plant as large an area of sugar cane as possible."

The level of the Lake has in fact risen several feet above the customary level during the rainy season, as it formerly existed in years of average and usual rain fall, in violation of the restriction contained in Paragraph IV of the franchise (R. 10; *ante*, pp. 3-4), resulting in extensive flooding of low lands in the Lajas Valley to the west of the Lake (Commission report, R. 33-37, approved in its order, R. 29).

This flooded condition did not begin until about 1926, some 25 years after the original grant of the franchise (except that there were brief floods in 1914 and 1922).

On February 24, 1928, the Municipal Assembly of Lajas adopted a resolution finding that (R. 20-21):

> "Whereas the Government of Lajas has received a complaint signed by a number of real estate owners and residents of the ward of Costa of this Municipality wherein they complain of the difficulties created by the flow-back and overflow of the waters of Guanica Lake, which from and after the year 1926 have cut off

and interrupted the communication between two of the principal roads of this jurisdiction, these waters extending at present over the most fertile portion of said ward, thus preventing the cultivation and exploitation of the lands and threatening the public health with the diseases which by reason of this anomalous situation have arisen and have made life inconvenient by reason of the mosquito plagues which have developed in said region;

Whereas the said Guanica Lake has always had as outlet the Negro Pond, which connects it with the sea, and according to information received by this Municipal Assembly, this situation is due to the fact that at the mouth of Negro Pond of the Guanica Lake tree-trunks and walls of ground have been raised, which prevent the flow of water from the lake and have forced and raised the level of the waters to points and heights which they never reached before, and the same had never affected the conditions of this community like they are affecting it at present, nor caused any disease and loss of property, nor any complaints like the one now brought before this municipal body had been filed before;

Whereas this Municipal Assembly has been informed that the works which prevent the outlet of the Guanica Lake and caused the flow-back of the waters have been carried out under the authority of the Executive Council of Puerto Rico or under a franchise of the Public Service Commission, and it is known by this Assembly that the flood or invasion of these waters has cut off the station of the American Railroad Company in the ward of La Plata from the ward of Costa, through roads numbers 9 and 10 of this Municipality, which are known as Fabiani and don Mariano roads, and it is of general knowledge in this municipality that at present and from and after the year 1926, these roads can not be used, and it is necessary to evade them by going around the town of Lajas in order to reach the said railroad station, and all of this causes material injury to this municipality; and

> Whereas it is the unavoidable duty of this municipal organism to protect the health and welfare of its citizens and taxpayers; and in order to procure the health of its people it should always act in such a manner that the community be always safeguarded and defended according to law;"

and directing that complaint be filed with the Public Service Commission of Puerto Rico and with the Commissioner of the Interior of Puerto Rico. (R. 21)

> "that the engineering works carried out on Negro Pond of Guanica Lake are causing irreparable damages to the Municipality of Lajas, by throwing the waters of Guanica Lake beyond their highest level; by invading, as they have, municipal roads numbers 9 and 10 of this jurisdiction, and by making the life of the residents and real estate owners of the wards of Costa and Plata impossible, and in order that an investigation of the case be made by the proper party so as to protect the interest of one of the richest regions of Puerto Rico and the health and life of this community."

The Municipality's complaint was transmitted by the Governor of Puerto Rico to the Public Service Commission. (Letter from the Commissioner of the Interior to the Governor, May 22, 1928, reporting that the Department of the Interior had investigated the causes of flood in the Lajas Valley and that "this special situation has been apparently created by the violation" of some of the provisions of the franchise (R. 23-24); and letter from the Governor to the Public Service Commission, May 22, 1928, R. 22-23). The Commission entered an "Order to Show Cause" (R. 16-19) May 26, 1928, addressed to Russell and Company, Sucrs., S. en C., Ensenada Estates, Inc., Guanica Centrale, and "any other person or legal entity" interested in the franchise. Russell and Company appeared and moved to dismiss the proceeding on the grounds (1) that the Public Service Commission did not have jurisdiction to cancel the franchise, and (2) that

> "none of the parties appearing in this cause is a public service corporation or a public service partnership, or is engaged in any manner in public service, and that this Commission does not have jurisdiction over these parties or over any one of them." (R. 25)

But Russell and Company afterwards, on November 27, 1928, answered generally (R. 26-28) setting up (Par. I) that it was the **assignee and owner of that part of the franchise referring to the use of water** of Guanica Lake for irrigation purposes, that is to say, the rights under Paragraphs I to IV inclusive of the franchise; admitting that the assignment to it, and the *mesne* assignments from the original assignee under which it claims, had not been approved by the Executive Council or the Public Service Commission, but claiming that "such approval was unnecessary for their validity inasmuch as the franchise itself authorizes its assignment or grant"; alleging that (Par. II, R. 27):

> "neither this partnership nor the former owners of that part of the franchise which refers to the use of certain waters has not carried out any works in connection with the taking of water for the use to which said paragraph refers, and that inasmuch as it has not done the said works, it was not necessary or possible to submit plans to the Commissioner of the Interior;"

admitting that the level of the water of the Guanica Lake has been higher than the usual level and that some lands and roads have been flooded but denying that this was caused by any act, blame or negligence of itself or of the former owners of the franchise, "but solely by acts of nature beyond the control of this partnership", and setting up that if any person has suffered damages, the only remedy of such person "is the remedy by suit granted by the franchise itself, and that said reasons do not justify at any time the cancellation of the franchise"; alleging (Par. IV, R. 27-28) that the Executive Council had authority to

grant the franchise and that the franchise is entirely valid and legal; that "this partnership" and the former owners had complied with its provisions, and that (R. 28),

> "acting in good faith and in accordance with the provisions of said franchise, this partnership and the former owners of the franchise have spent great sums of money in pipes, pumps, canals and other works for taking and using the water of Guanica Lake",

and that its cancellation would cause "this partnership" great loss of money and property and would be equivalent to taking its property without due process of law and taking it for public purposes without just compensation, contrary to the Fifth and Fourteenth Amendments and to the Organic Act for Puerto Rico and "to the acts and statutes of Puerto Rico and of the United States"; alleging (Par. V, R. 28) that the Commission "does not have jurisdiction over this partnership", and setting up as a separate defense (Par. VI, R. 28),

> "That although this partnership had no obligation whatsoever to do so, it has taken the necessary and proper steps to lower the height of the waters of Guanica Lake to its customary level and to guarantee that in the future the waters will not go beyond the customery level, and that this partnership has paid all the expenses of said works out of its own money."

Meantime, without waiting for the final decision of the Commission, Russell and Company, and South Porto Rico Sugar Company filed a bill in the District Court of the United States for the District of Puerto Rico to enjoin the Commission from proceeding in the matter, and upon dismissal of the bill by that court on July 13, 1928, appealed to the Circuit Court of Appeals for the First Circuit, which, October 26, 1928, affirmed the District Court's judgment (28 F. (2d) 820), holding (1) that the suit was premature, but also (2) that "the Public Service Commission had

jurisdiction." A copy of that opinion is in Appendix II (*infra*, pp. 45-50).

After that litigation was ended, and Russell and Company had afterwards filed their general answer with the Commission on November 27, 1928, as above stated (R. 26-28; *ante*, pp. 11-12), the Commission took testimony and heard argument and finally on March 7, 1929, its president presented a written report (R. 30-37) and the next day, March 8, 1929, the Commission approved the report and entered the order here in question, cancelling that part of the franchise held by Russell and Company, that is to say, that part relating to the use of the waters of Guanica Lake for irrigation purposes (R. 29-30).

STATUTES INVOLVED

FEDERAL:

(1) Section 32 of the Act of April 12, 1900, entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes", provided (31 Stat. 83-84):

> "Sec. 32. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however*, That all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

(2) Section 3 of Joint Resolution No. 23, approved May 1, 1900, referring to the statute last above quoted, provided in part (31 Stat. 715):

"Sec. 3. That all franchises, privileges or concessions granted under section thirty-two of said Act shall provide that the same shall be subject to amendment, alteration or repeal; * * *."

(3) Section 2 of the Organic Act for Puerto Rico (Act of March 2, 1917, 39 Stat. 951; 48 U. S. C. A. 737) provides in pertinent part:

"No law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. * * *.

"Private property shall not be taken or damaged for public use except upon payment of just compensation ascertained in the manner provided by law."

(4) Section 38 of the Organic Act for Puerto Rico (Act of March 2, 1917, 39 Stat. 964), as amended by Section 6 of the Act of March 4, 1927 (44 Stat. 1420-1421; 48 U. S. C. A. 750-753), provides in pertinent part:

"Sec. 38. That all grants of franchises, rights, privileges, and concessions of a public or quasi public nature shall be made by a public service commission consisting of a public service commissioner, who shall be the president of the said commission, and two associated commissioners, to be appointed by the governor with the advice and consent of the senate. * * * The said commission is empowered and directed to discharge all the executive functions relating to public corporations heretofore conferred by law upon the executive council and such additional duties and functions as may be conferred upon said commission by the legislature. * * *.

"The legislative assembly of Porto Rico is hereby authorized to enact laws relating to the regulation of the rates, tariffs, and service of all public carriers in Porto Rico, and the public service commission hereby created shall have power to enforce such laws under appropriate regulation."

PUERTO RICAN:

The Public Service Act of Puerto Rico (Act No. 70 of December 6, 1917; Laws of P. R. 1917, Vol. II, pp. 432-546), defines the powers of the Public Service Commission. Pertinent extracts therefrom and from an earlier Act of March 12, 1908, and from the Civil Code of Puerto Rico, appear in Appendix I hereto, *infra*, pp. 33-44.

OPINION OF THE INSULAR DISTRICT COURT

Russell and Company appealed to the insular District Court for the District of San Juan, which, on June 4, 1930, handed down a very careful opinion (R. 49-66) and entered its judgment the same day (R. 66-68) affirming the order of the Commission and dismissing the appeal. In the course of its opinion the District Court said (R. 54) that the three questions before it for decision were:

> "1. Whether the order appealed from, rendered by the Public Service Commission on March 8th, 1929, is reasonable or not.
> "2. Whether said order is legal or not.
> "3. Whether it has been based on incompetent evidence, affecting the decision and order of the Commission."

It found (R. 63-64) that:

> "The appellants do not allege that the order appealed from is based on incompetent evidence. The record shows that the Commission had before it abundant evidence offered by the parties, and that it handed its decision after considering said evidence. Neither in the petition for appeal nor in the brief for the appellants any error is assigned for admitting evidence which was legally incompetent and which materially affected the decision of the case."

It found that the second question "whether said order is legal or not" had been determined by the decision of the Circuit Court of Appeals in *South Porto Rico Sugar Company* vs. *Munoz, supra,* 28 F. (2d) 820, upholding the jurisdiction of the Commission, the opinion in which it quotes in full (R. 56-63). And it found that the Commission's order was "reasonable", saying (R. 65-66):

> "We adopt, with approval, the following statements contained in the brief for the Public Service Commission:
>
> " 'While it orders the cancellation of that part of the franchise which refers to the use of certain waters, it is at the same time liberal and benevolent as it leaves the parties in interest at liberty to file whatever new petitions with regard to the use of the waters they may deem wise and to submit to the Commission specific data as to the maximum height, as well as the drafts of any works that may be done to keep the waters at a permanent level.
>
> " 'Being compelled to take serious steps in order to protect the inhabitants and the owners of the valley of Lajas from the acts of the holder of the franchise, the Commission did the least it could do, namely: deprive them of the legal means with which they could continue causing injury, but at the same time it gave them a new opportunity for using the waters with the assurance that such state of affairs as the one which gave rise to the order appealed from would not be repeated.' "

OPINION OF THE SUPREME COURT OF PUERTO RICO

Russell and Company (or rather, Horace Havemeyer and the other five individual respondents here, as "members of the civil agricultural partnership of Puerto Rico, Russell and Company, Sucrs., S. en C."; R. 1-2; R. 68) appealed to the Supreme Court of Puerto Rico which, on November 9, 1933 (R. 82), affirmed the judgment of the

District Court of San Juan. The opinion of the insular Supreme Court (45 Dec. de Puerto Rico, *Spanish Ed.*, 698; *not yet published in the English edition*) is on pages 70 to 81 of the transcript of the record. It calls attention (R. 70-71) to the provisions (Section 84) of Puerto Rican Act No. 70 of 1917, "The Public Service Act of Puerto Rico",

> "that in all such cases the orders of the Commission shall be *prima facie* evidence of the reasonableness thereof; that the burden of proving the contrary shall be upon the appellant or appellants, and that if the court shall upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the Commission."

After reciting the facts appearing from the certified copy of the record of the Commission "which was presented to the district court and is now before us" (R. 71), the opinion proceeds (R. 74):

> "The claim of Russell & Company that the Commission lacks jurisdiction to cancel or modify the franchise was raised by the corporation South Porto Rico Sugar Company before the United States District Court for the District of Puerto Rico, when in an injunction proceeding it prayed that the said Commission be restrained from interfering in the case. This petition was denied and on appeal the United States Circuit Court of Appeals for the First Circuit said:" * * * (quoting at length from the opinion of the Circuit Court of Appeals in the *South Porto Rico Sugar Company* case v. *Munoz, supra*, 28 F. (2d) 820; and then proceeding, R. 79), * * *—
>
> "The first three errors assigned by the appellant as committed by the court below claim that the Commission has no authority, power or jurisdiction to cancel or modify the said franchise, and merely expound them without argument, inasmuch as *this question has been decided by the Circuit Court of Appeals for the First Circuit, as we have already stated.*' (Italics supplied.)

It adds (R. 79-80);

> "It was neither claimed before the District Court nor before this court that the evidence admitted by the Commission in order to enter its decree is incompetent, for which reason the controversy is limited to a determination of whether such decree is reasonable or not and whether it is in accord with the law."

The court then discusses (R. 80-81) the evidence and the terms of the franchise and concludes (R. 81);

> "Consequently, we arrive at the conclusion that the order or decree of the Commission is reasonable and in accord with the law, inasmuch as appellant has failed to comply with the conditions of the franchise."

OPINION OF THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals (R. 89-104) upheld the power of the Public Service Commission to repeal the franchise,—(that part of the original franchise which had been assigned to Russell & Company, which is all that Russell & Co. held, and all that is involved here),—but held also that it was within the scope of its judicial power, and its duty, to review the *reasonableness* of the Commission's repealing order, and that, in its opinion (R. 102-104),

> "it was only necessary to amend or modify the franchise by requiring the establishment of a gauge above which the waters should not be permitted to be raised by the owner of the franchise, except during periods of extraordinary rains, and for a period sufficient to permit the excessive waters to be reduced in due course to the height of the gauge so established. * * * *
>
> "And it was, no doubt, with this in mind that the Commission postponed the taking effect of its order, which carried with it the implication that it would agree to an amendment of the franchise requiring the waters of the Lake to be maintained at or below a certain level, except during the period of excessive rains, which alteration or amendment we think it had the power to make; and while we cannot assume, notwithstanding the delay caused by the appeals, which we

think were taken in good faith, that the Commission will not act in fairness to the appellant allowing an amendment or modification of the franchise and grant a further extension of time in which they may file a petition requesting and consenting to an amendment to the franchise imposing a reasonable limitation of the height at which the waters of the Lake may be maintained, we nevertheless think a proper procedure in this case will be to reverse the judgment of the Supreme Court. The Commission may then proceed upon the evidence before it, and upon further investigation, establish a reasonable limitation upon the height at which the waters of the Lake may be maintained, and amend the franchise of the appellants so as to restrict their right to hold the waters back under normal conditions at a higher level than the height so fixed."

It also held (R. 89-90) that: "It is of no importance whether the individual members of Russell & Company are parties to this appeal"; and accordingly reversed the judgment of the insular Supreme Court and remanded the case "for further proceedings not inconsistent with this opinion, but without costs" (R. 104).

PETITIONER'S CONTENTIONS

Petitioners submit that a review of the *reasonableness* of the administrative or executive decision of the Public Service Commission to exercise the contractual right to repeal the franchise, which was reserved in granting it, is wholly outside of the scope of the judicial power of a constitutional court of the United States; that a question of the kind of "reasonableness" here involved, of a purely executive decision to exercise a contractual right of the government, is a wholly different kind of question of "reasonableness" from that involved in the exercise of the police power or the power of eminent domain, or of the government to take property or to cancel a franchise or to alter or amend it where a judicial question may arise of whether the executive authority, — public service commission or

other executive officer or authority, — has over-stepped the bounds of the police power or is attempting to take property without just compensation, or so to alter or amend a franchise as to destroy the essential character of the original grant so that its action may be charged to be "confiscatory" in character, where the words "reasonable", "reasonableness", are used by the court in attempting to draw the often shadowy line between action within the bounds of the executive power and action that oversteps those bounds and becomes confiscatory. Whether the executive authority has over-stepped the bounds is, of course, a judicial question. But that is a wholly different kind of question of "reasonableness" from a question whether the exercise of an existing contractual right of the government to repeal a franchise is the most sensible or just or appropriate manner of dealing with the situation. The latter is purely an executive problem, presenting no judicial question, and wholly beyond the scope of the judicial power.

In any event, the action of the Public Service Commission in this case was very reasonable; and was necessary in the public interest.

And these six individual respondents, — the appellants in the Circuit Court of Appeals, — are not themselves the *Sociedad en Comandita* Russell & Company, which alone claims title to this franchise. These six individuals had no standing to maintain an appeal from the insular Supreme Court to the Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The principal question here presented of the scope of the judicial power of the United States, and of the power of a constitutional court of the United States to review the action of a public service commission in exercising a contractual right to repeal a public utility franchise, reserved to the government in the grant of the franchise, does not appear to have been directly decided by this court. It is

an important question of federal law, which it is believed this court should settle. It is believed that the decision of the Circuit Court of Appeals is untenable, and is probably in conflict with applicable decisions of this court. The question here presented, involving the nature and extent of the powers of the Public Service Commission of Puerto Rico, is of very great interest and importance to the people of Puerto Rico and to the insular government.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari be granted.

WILLIAM CATTRON RIGBY,
Attorney for Petitioners.

BENJAMIN J. HORTON,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior
Of Counsel.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the insular District Court of San Juan (R. 49-66) is not officially reported. The opinion of the Supreme Court of Puerto Rico (R. 70-81) is reported in volume 45, *Decisiones de Puerto Rico* (Spanish edition), p. 698. It has not yet appeared in the English edition of the Puerto Rico Reports. The opinion of the Circuit Court of Appeals (R. 89-104) is reported in 74 F. (2nd), 637.

A copy of the opinion of the Circuit Court of Appeals in the former case, the injunction suit brought by the South Porto Rico Sugar Company and Russell and Company to enjoin the Public Service Commission from acting in this matter (*South Porto Rico Sugar Co.* vs. *Munoz et al.*, 28 F. (2nd) 820), is in Appendix II, *infra*, pp. 45-50.

JURISDICTION

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered January 10, 1935 (R. 105). The time within which to apply for a writ of certiorari to this court was extended sixty days by order of Mr. JUSTICE BRANDEIS, until June 9, 1935 (R. 107).

QUESTIONS PRESENTED

The questions here presented are stated in the Petition (*ante*, pp. 2-3).

STATUTES INVOLVED

These are indicated in the Petition (*ante*, pp. 13-15; and Appendix I, *infra*, pp. 33-44).

STATEMENT

A statement of the case is in the Petition (*ante*, pp. 3-13).

SPECIFICATION OF ERRORS TO BE URGED

These are indicated under the headings "Questions Presented" and "Petitioner's Contentions" in the Petition (*ante*, pp. 2-3 and 19-20).

SUMMARY OF ARGUMENT

The action of the Public Service Commission repealing that portion of the original franchise held by Russell & Company was purely executive action. The franchise accepted by the original grantee contained the clause expressly reserving to the government the right to repeal it at any time. That was a contractual right, to be exercised in its discretion by the executive branch of the government. Its exercise involved no question of eminent domain, nor of the police power, nor of the extent of the government's powers, or of the executive powers of the Commission. The determination of the wisdom of exercising the government's right in that regard, and the action exercising it, were purely executive acts, involving no judicial question. Any question of the "reasonableness" of taking such executive action was purely a question of its wisdom from the administrative point of view; of whether that was the most sensible, just or appropriate manner of handling the problem and of relieving the situation brought about by the flooding of the lands in the Municipality of Lajas. It was purely an administrative question. That is a wholly different kind of question of "reasonableness" from the kind of question presented in the exercise of the power of eminent domain, or the police power, where the question of "reasonableness" involved is a question of exceeding governmental powers. But where, as here, the question of "reasonableness" involved, is merely a question of the wisdom of the executive authority in exercising administrative powers admittedly within its province, the court has no power to review the executive action.

In this case the Public Service Commission acted only after a full hearing, upon complaint of the Municipality of

Lajas, because the flooded condition of the lands in that municipality, destroying property of the inhabitants and endangering their health and comfort and safety, required some action. The floods were due to the wrongful act or neglect of the franchise holder, Russell & Company, in permitting the water in Guanica Lake to rise some three feet above the normal level to which the franchise contemplated it should be held. The added height of the water was manifestly to Russell & Company's advantage, permitting it to irrigate a larger area of its cane lands by gravity. The Commission's action was not only entirely within its powers under the franchise which expressly reserved the right to repeal it, but was also very reasonable. There was a full hearing; the Commission invited Russell & Company to submit plans for controlling the height of the water; and only upon the Company's failure to submit any plan did the Commission repeal the franchise. And the repeal order did not direct that it should take effect immediately, but allowed a period of more than ninety days before it should become effective, and invited Russell & Company to submit in the meantime, plans for controlling the height of the water, with a view to a new franchise embodying such plans and properly providing against destructive floods.

For the court to undertake to review the wisdom of the Commission in the course it followed, and to say as does the Circuit Court of Appeals in its opinion that there is some other better way, and to dictate the course the Commission is to follow, is simply to undertake to review the exercise of executive discretion; to substitute the opinion of the Judges for that of the Members of the Public Service Commission; and is a plain trespass by the judicial power upon the field of the executive.

In our form of government, the separation between the fields of the three great departments of the government is basic and vital. It is essential that it be respected, and that neither of the departments trespass upon the field of

the others. The opinion of the Circuit Court of Appeals violates that rule. It is believed that the Judges of that Court, sitting in Boston, far removed from the local situation in Puerto Rico, are not as well fitted as are the members of the Public Service Commission in touch with the local situation there in Puerto Rico, to determine the wisdom or the necessity of the exercise of the executive power vested in the Commission to repeal the franchise.

Th Circuit Court of Appeals should have dismissed the appeal for want of jurisdiction, as moot; because it was not brought by Russell & Company, *Sociedad en Comandita,* the sole claimant of the franchise, but by these six individual appellants (respondents here). While they may be members of the *Sociedad,* they are not the corporate entity, and a judgment for or against them cannot bind it. Nor have they in their individual capacities any right or ownership in the franchise, nor any property interest in it upon which to maintain the appeal from the judgment of the insular Supreme Court. The judgment of the Circuit Court of Appeals should be reversed with directions to dismiss the appeal from the insular Supreme Court for want of jurisdiction; or else the judgment of the Supreme Court of Puerto Rico affirmed.

ARGUMENT

POINT I

The order of the Public Service Commission of Puerto Rico repealing the franchise was executive action; and was within the scope of the Commission's power.

It is believed that there can be no question of this. The Circuit Court of Appeals so held (96-100) affirming to this extent the opinions of the Supreme Court of Puerto Rico and of the insular District Court of San Juan; and it had likewise so held in the earlier case in which South Porto Rico Sugar Company and Russell & Company sought to enjoin the Commission's action. (*South Porto Rico Sugar*

Company vs. *Munoz,* 28 F. (2nd) 820, October 26, 1928; Appendix II, *infra,* pp. 45-50). The repeal was in accordance with an unconditional right to repeal the franchise reserved in the original grant (Par. XVIII, R. 15; *ante,* p. 5) in accordance with the requirement of the Act of Congress that such a reservation be inserted in every such franchise granted in Puerto Rico. Section 3 of Joint Resolution No. 23, May 1, 1900, 31 Stat. 715; Section 38 of the Organic Act for Puerto Rico, March 2, 1917, 39 Stat. 954 as amended; *ante,* p. 3.

And the Commission's action was none the less purely executive in character, although for some other purposes the Commission might be clothed with apparently legislative or *quasi*-judicial powers. *Prentis vs. Atlantic Coast Line,* 211 U. S. 210, 228.

Plainly the determination whether or not to exercise the government's power to repeal the franchise is an exercise of executive power. It is not the making of a rule of action and is, therefore, not legislative in character; and it is not a decision upon the existence of a right determined by a fixed existing rule of law because it involves the exercise of discretion whether or not to act as seems wiser and in the better interest of the public under all the circumstances. It must, therefore, be executive in character. As this Court said in the Philippine "Board of Control cases" (*Springer* vs. *Philippine Islands,* 277 U. S., 189, 202-203):

> "The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the power of government are divided."

POINT II

The Commission's action was wholly reasonable.

The franchise-holder's fault permitting the waters impounded in the Lake to rise to a point where they were widely flooding the neighboring Municipality of Lajas, and

the Commission having vainly invited the franchise-holder by its interlocutory order of December 17, 1928, to:

> "prepare a draft of the work to be done with the object of lowering the level of the waters of the Lake * * * it being understood that this * * * is purely and simply an emergency measure, whose principal object is to remedy the immediate situation of the zone in question, and that this in no wise will prejudice the questions involved in this case" (R. 46-49, at p. 48),

without receiving any reply or aid from the Company the Commission, nearly four months later entered its order on March 8, 1929, repealing the franchise, *but did not make its order effective for another three and one-half months,* until June 30, 1929, directing (R. 29-30):

> "Provided that this cancellation shall become effective June 30, 1929. *It is understood, furthermore, that in the meantime the parties in interest are at liberty to file any further petition* which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the Lake, as well as the plans of any other works, in order that this level may be permanently kept."

It is respectfully submitted that the District Court was right when it said in its opinion (R. 65; *ante,* p. 16):

> "We adopt, with approval, the following statements contained in the brief for the Public Service Commission:
>
> "The order appealed from by itself shows its reasonableness.
>
> "While it orders the cancellation of that part of the franchise which refers to the use of certain waters, it is at the same time liberal and benevolent as it leaves the parties in interest at liberty to file whatever new petitions with regard to the use of the waters they may deem wise and to submit to the Commission specific data as to the maximum height, as well as the drafts of any works that may be done to keep the waters at a permanent level.

"Being compelled to take serious steps in order to protect the inhabitants and the owners of the valley of Lajas from the acts of the holder of the franchise, the Commission did the least that it could do, namely: deprive them of the legal means with which they could continue causing injury, but at the same time it gave them a new opportunity for using the waters with the assurance that such state of affairs as the one which gave rise to the order appealed from would not be repeated."

POINT III

Since the Commission's order repealing the franchise involved nothing but the exercise of executive discretion vested in the Commission, it is not subject to review of the courts.

It is well settled that the review of administrative or executive action (or of legislative action) does not lie within the scope of the judicial power; and cannot be conferred upon a constitutional court of the United States, even by direct Act of Congress. This Court said in *Keller* vs. *Potomac Electric Co.*, 261 U. S. 428, 444:

"Such legislative or administrative jurisdiction, it is well settled, cannot be conferred on this court either directly or by appeal. The latest and fullest authority on this point is to be found in the opinion of Mr. Justice Day, speaking for the court in *Muskrat v. United States*, 219 U. S. 346. The principle there recognized and enforced on reason and authority is that *the jurisdiction of this court and of the inferior courts of the United States* ordained and established by Congress under and by virtue of the third article of the Constitution, *is limited to cases and controversies* in such form that the judicial power is capable of acting on them, *and does not extend* to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to *administrative* or legislative *issues or controversies.*" (Italics ours.)

A.—In any event, the question of the *reasonableness* of

the order of the Public Service Commission is one of *local law,*—or rather is a mixed question of fact and of local law,—in which this court will ordinarily not interfere, but will follow the decision of the territorial Supreme Court, unless it is "clearly erroneous".

Trujillo v. *Rodriguez,* 233 Fed. 208.
Richardson v. *Fajardo Sugar Co.,* 237 Fed. 195.
Graham v. *O'Ferral,* 248 Fed. 10.
Henna v. *Sauri and Subira,* 237 Fed. 145.
Cardona v. *Quinones,* 240 U. S. 83.
Sola v. *Cintron,* 237 Fed. 61.
Ibanez v. *Hongkong, etc., Bkg. Corp.,* 246 U. S. 621, 627 (Phil. Appeal).
Garcia v. *Hernandez,* 270 Fed. 455.
Castle v. *Castle,* 281 Fed. 609 (Hawaii).

B.—The order of the Public Service Commission in the present case, and the judgments of the insular District Court of San Juan, and of the insular Supreme Court, affirming it, are certainly not "clearly erroneous" within the meaning of the foregoing rule. To the contrary, the order was clearly right, and very reasonable. Attention is invited to what the insular District Court said on this point, adopting with approval the language of the brief filed in that court on behalf of the Public Service Commission (R. 65-66) hereinbefore quoted ("Statement", *ante,* p. 14).

POINT IV

The judgment of the Circuit Court of Appeals should be reversed because these individual respondents, Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, had no standing to maintain an appeal to that court.

This record does not show any ownership or claim of ownership in these six individuals in the franchise here involved. The claim of ownership is in Russell & Company, Suers., S. en C. (*Answer of Russell and Company before the Commission,* Par. I, R. 26-27), a *sociedad en comandita*

of Puerto Rico, a juridical entity of the category expressly declared by Section 2 of the Public Service Act of Puerto Rico (Act No. 70, Appendix I, p. 33, *infra;* Laws of Puerto Rico, 1917, Vol. II, p. 433, *Spanish text,—"las personas* naturales o *juridicas"*) to be capable of being "Public Service Companies" under that act. And this court, some months before the appeal was taken on November 9, 1933 (R. 82) from the judgment of the insular Supreme Court to the Circuit Court of Appeals, had decided, in the case of *People of Puerto Rico* vs. *Russell and Company,* 288 U. S. 476, March 13, 1933, that this very *sociedad en comandita,* Russell and Company itself, was to be treated as a corporation for the purposes of the jurisdiction of the federal courts, and not as a partnership.

It follows that the corporate body, the *sociedad en comandita,* is a necessary party to these proceedings; and that these six individuals may not substitute themselves for it, even though they may claim that they are its only members. Judgment against them would not bind the corporate entity. *Their appeal to the Circuit Court of Appeals really presented nothing but a moot case.* These respondents are not the owners of the property involved.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed, and respondents' appeal to that court from the insular Supreme Court should be dismissed as moot, in the absence of the necessary party, Russell and Company, Sucrs., S. en C., or else the judgment of the insular Supreme Court should be affirmed. The order of the Public Service Commission of Puerto Rico repealing the franchise was clearly within its jurisdiction. The question of the reasonableness of its exercise of its executive power to repeal the franchise pursuant to the contractual right reserved to the government is not within the scope of the

judicial power of a constitutional court of the United States; but even if it were, the order was clearly right and very reasonable.

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APPENDIX I—PUERTO RICAN STATUTES

PUBLIC SERVICE ACT OF PUERTO RICO (Act No. 70, approved December 6, 1917; Laws of Puerto Rico, 1917, Vol. II, pp. 432-546).[1]

(No. 70.)

AN ACT

Defining public service companies; and providing for their regulation; prescribing, defining, regulating, and limiting their rights, powers and duties; prescribing and defining the powers and duties of the public service commission and its officers, prescribing and regulating the practice and procedure before such commission and upon appeal, and for other purposes.

Be it enacted by the Legislature of Porto Rico:

ARTICLE I.

Definitions.

Section 1.—The short title of this Act shall be "The Public Service Act of Porto Rico."

Section 2.—For the purposes of this Act public-service companies shall be such natural persons or bodies corporate as may engage in Porto Rico in any of the following pursuits or businesses:

(*a*) Transportation of persons or freight using in whole or in part marine, fluvial or land routes. (p. 432)

* * * * * * * * *

The term "service is used in this Act in its broadest sense, and includes any and all acts performed, and anything furnished or supplied, and all the facilities used or furnished or supplied by public-service companies in the

[1] The parenthetical reference following each extract relates to the page or pages of the volume of insular statutes above mentioned upon which the extract will be found. Except in paragraph headings the italics are supplied.

performance of their duties, to their patrons, employees and the public, as well as the interchange of facilities between two or more public-service companies. (p. 434)

* * * * * * * * *

The term "facilities", as used in this Act, includes all the plant, property and equipment of a public-service company, and any and all other means and instrumentalities, in any manner owned or used, managed or furnished in connection with the business of any public-service company; * * *.

The term "commission", when used in this Act, means the Public-Service Commission created by the Organic Act of Porto Rico. (p. 436)

* * * * * * * * *

ARTICLE II.

Duties and Liabilities of Public-Service Companies.

Section 3.—It shall be the duty of every public-service company:

(*a*) *Safe Service and Facilities.*—To furnish and maintain such service, including facilities, as shall in all respects be just, safe, reasonable, adequate, and practically sufficient *for the accommodation and safety of its patrons, employees, and the public, and in conformity with such reasonable regulations or orders as may be made by the commission.*

* * * * * * * * *

(*c*) *Changes and Repairs of Service and Facilities.*—To make all such repairs, changes, alterations, and improvements, including facilities, as shall be reasonably necessary *for the accommodation or safety of its patrons, employees and the public.* (p. 436)

* * * * * * * * *

(*y*) *Obeying of Orders and Rules of Commission.*—To

observe and obey all and singular the lawful orders and regulations which may be issued or made by the commission in the exercise of the powers conferred upon it by this Act. (pp. 453, 456)

ARTICLE III.

Powers and Limitations of Powers of Public-Service Companies.

Section 4.—It shall be lawful for every public-service company—

* * * * * * * * *

(*d*) *Complaint to Commission.*—To apply to the commission by complaint, in the manner hereinafter provided in this Act, whenever such company claims to be aggrieved by any ruling, regulation, classification, or order which it is or has been required by the commission to observe or carry into effect; and thereupon such public-service company shall be entitled to a full and fair hearing, and a speedy determination of its complaint on the merits, by the commission, and to all just and reasonable relief consistent with the rights and duties of such public-service company. (p. 458)

ARTICLE IV.

Constitution of the Commission.

Section 14.—*Functions, Name, Actions by and seal of Commission.*—The Public Service Commission created by the Organic Act shall discharge all of the executive functions relating to public-service companies heretofore discharged by the Executive Council and shall grant all franchises, rights, powers and privileges of a public or quasi-public nature, as therein and herein provided. *It shall also have power to regulate all public-service companies as therein and herein specified and carry out the provisions of this Act, and it shall be known as "The Public Service Commission of Porto Rico."* * * *. (p. 476)

* * * * * * * * * *

ARTICLE V.

Powers and Duties of the Commission.

Section 24. — *General Powers.* — The commission shall have general administrative power and authority, as provided in the Organic Act, and in this Act, to discharge all of the executive functions relating to public-service companies heretofore conferred by law upon the Executive Council, to make all grants of franchises, rights and privileges of a public or a quasi-public nature, to supervise and regulate all public-service companies doing business in Porto Rico, and to carry out the provisions of this Act.

Said power and authority shall include the power *to* inquire into, hear, determine and regulate the service, * * *; the making of *repairs, alterations, and improvements in and to such service, as shall be reasonably necessary for the accommodation or safety of its patrons, employees, and the public;* * * *; *the safety, adequacy, and sufficiency of the facilities, plant and equipment for the carrying on of their business by said public-service companies;* * * *. (pp. 480, 482)

Section 25. — *Regulation of Services, Facilities, Rules, Regulations and Practices.* — Whenever the commission shall determine, after hearing had upon its own motion, or upon complaint, as hereinafter provided, that the service, facilities, rules and regulations, practices, or classifications of any public-service company, in respect to its public duties are unsafe, inadequate, insufficient, unjust, or unreasonable, the commission shall determine and specify by an order in writing to be made and filed as hereinafter provided the just, reasonable, safe, adequate, and sufficient service, facilities, rules, regulations, or practices thereafter to be put in force, observed, rendered, used, or furnished in the performance of its public duties by said pub-

lic-service company; and thereupon it shall be the duty of every public-service company affected by said order to observe and obey said order. (p. 484)

• • • • • • • • • •

Section 35.—*Establishment of Standards of Facilities and Services.*— • • • The commission shall also have power, after hearing had upon its own motion or upon complaint, to require public-service companies *to make all such repairs, changes, alterations, additions,* extensions *and improvements in and about their facilities and service as shall be reasonably necessary and proper for the safety, accommodation, convenience and service of their patrons,* employees *and the public.* (p. 498)

• • • • • • • • • •

Section 46. — *General Inquisitorial Powers.* — The commission shall, as a commission, or by its individual members, have the power in any part of Porto Rico to subpoena witnesses, to administer oaths, to examine witnesses, or to take such testimony, or compel the production of such books, papers and documents, as it may deem necessary or proper in and pertinent to any proceeding, investigation or hearing held or had by it, and to do all necessary and proper things and acts in the lawful exercise of its powers or the performance of its duties. (p. 510)

• • • • • • • • • •

Section 49.—*Power to Enforce Act.*—In addition to the foregoing expressly enumerated powers, the commission shall have authority and it shall be its duty, to enforce, execute and carry out, by its orders, rulings, regulations or otherwise, all and singular, the provisions of articles two and three of this Act, relating, respectively, to the duties and limitations, and to the creation and powers and limitation of powers of public-service companies; and, all and singular, the other provisions of this Act, and the full in-

tent thereof; and shall have the power to rescind or modify any such orders, rulings or regulations (pp. 510,512)

* * * * * * * * * *

Section 54.—*Grants subject to Repeal and Alteration.*—All grants of franchises, rights, privileges or concessions shall be subject to amendment, alteration *or repeal by the commission,* and shall provide for the same. (p. 514)

* * * * * * * * * *

Section 60.—*Violation of existing franchises.*—Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Ex-executive Council and is now in force; *Provided, however,* That the commission shall have the power to alter, amend, modify or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law. (pp. 514,516)

* * * * * * * * *

ARTICLE VII.

Practice and Procedure before the Commission and upon Appeal.

Section 62.—*Hearings to be Public—Self-Incrimination —Perjury.*—All hearings before the commission or before any commissioner, shall be public; and all hearings, investigations and proceedings by the commission shall be governed by such rules, not inconsistent with this Act, as shall be adopted and prescribed by the commission * * *. (p. 516)

Section 64. — *Contempt by Refusal.* — If any individual who shall be subpoenaed to attend before the commission or a commissioner shall fail to obey such subpoena, or if any individual in attendance before the commission or a commissioner shall refuse to be sworn or to be examined, or to answer any relevant question, or to produce any rele-

vant book, paper or document when ordered so to do by the commission or a commissioner, the commission or commissioner may invoke the aid of any district court in Porto Rico to enforce such attendance and testimony of witnesses and the production of books, papers and documents; and such court, on due cause shown, shall issue an order requiring any person to appear before said commission or commissioner and produce books and other documents, if so ordered, and give testimony touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof, in the same manner as in the case of disobedience or the requirements of a subpoena issued from said courts, or a refusal to testify or produce evidence therein. (p. 520)

* * * * * * * * *

Section 69.—*Hearing on Motion of Commission.*—The commission may also, upon its own motion, and upon such notice as it may deem reasonable under the circumstances, institute any similar inquiry or investigation, and fix a time and place for a hearing with the same effect as though complaint had been made as aforesaid and satisfaction thereof refused. (p. 524)

* * * * * * * * *

Section 74.—*Service of Final Orders.*—Every final order of the commission shall be served upon each public-service company affected thereby, in the manner now provided by law for serving a writ of summons upon individuals or corporations; and return of said service shall be made by the person serving said order to the secretary of the commission, in the manner and form now provided by law for making return of the service of a writ or summons; and a certified copy of said order shall be mailed by registered mail to all other parties to the proceedings in which such order is issued, or their respective attorneys; but the failure of any public-service company or of any party to the proceedings to receive such copy shall not prevent the said

order from being conclusive, and taking effect on the date specified therein. (pp. 524, 526)

Section 75.—*Intervention in Final Orders for Rehearing.*—After any finding, determination or order shall have been made by the commission, any public-service company or municipal corporation affected thereby, or any party complainant in the proceedings, or any person, municipal corporation or public-service company, or association duly permitted by the commission, on proper petition and cause shown to intervene may apply, within fifteen days after the service of said order, for a hearing in respect to any matter determined by the commission in or by its hearing or investigation and order issued therein; and the commission may grant and hold such rehearing, if in its judgment sufficient cause therefor be shown. All applications for rehearing shall be by petition, specifically setting forth the grounds upon which such application is based. (p. 526)

Section 76.—*Application for Rehearing not to Stop Enforcement.*—No application for a rehearing shall in anywise operate as a supersedeas, or in any manner stay or postpone the enforcement of the original or existing order, except as the commission may by its order direct. (p. 526)

Section 77. — *Amendments of Orders on Rehearing.*—After such rehearing, should the same be granted, the commission may affirm, rescind, modify or amend its original order. Any order so made after rehearing shall have the same force and effect as an original order.

Section 78. — *Appeals to District Court — How Prosecuted.*—Within thirty days after the filing of any finding or determination by the commission, or after the date of service of any order, unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application, or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination or order, any party to the proceedings af-

fected thereby may appeal therefrom to the District Court of San Juan, Section 1; * * *. (p. 526)

Section 79 (as amended by Sec. 8 of Act No. 2, May 7, 1927; Laws of P. R., 1927, pp. 404-406): *Certification of Record.*—The commission shall be immediately notified by the appellant or appellants of the taking of an appeal, and within thirty days after such notice the said commission shall certify under its official seal to the proper court, the record of the said proceedings. Said record shall include the testimony taken, the findings of facts, if any, of the commission, based upon such testimony, a copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission. * * *.

Section 80.—*Supersedeas on Appeal.*—No appeal from any order of the commission (except as hereinafter provided) shall in any case operate as a supersedeas of the order appealed from, unless the aforesaid proper court shall, by an interlocutory order, make said appeal as a supersedeas; which interlocutory order shall be made after such notice to the commission and other parties of record, and after a hearing upon said application for an interlocutory order of supersedeas. Upon the granting of a supersedeas upon the application of a public-service company in any case (except as hereinafter provided), the court may, in its discretion, require the filing of a bond in favor of The People of Porto Rico, for the use of all parties aggrieved, in such sum and condition as the court may by its order direct, or may grant the supersedeas upon such other terms and conditions as the court in its discretion prescribes; * * *." (pp. 528-530)

* * * * * * * * *

Section 82.—*Answer by Commission.*—An answer shall be filed by the commission within thirty days after the service of notice upon it of the taking of an appeal. Leave may also be given by the court to any other party to the

record to file an answer. Upon the filing of an answer by the commission the case shall be considered at issue and a hearing shall be held before said court as hereinafter provided, without further pleadings. Copies of the petition and answer shall be served upon the opposite party or parties within five days after filing the same. (pp. 530, 532)

Section 83.—*Record as Evidence.*—At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law. (p. 532)

Section 84.—*Orders as Evidence—Burden of Proof.*—In all such cases the orders of the commission shall be *prima facie* evidence of the reasonableness thereof, and the burden of proving the contrary shall be upon the appellant or appellants; and the notes or testimony taken before the commission or any of the members thereof, duly certified under its seal, and filed as aforesaid as a part of the record shall be considered by the courts as the testimony in the case. (p. 532)

Section 85. — *Decree of Court, How Entered.* — If the court shall upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the commission. If the court shall, upon the record, find that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law, it may enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law. In case the said court shall reverse an order of the commission dismissing a complaint, after an investigation and hearing thereon be-

fore the commission, it shall remand the record and proceedings to the commission, with directions to reinstate the complaint, proceed to another hearing and investigation, and make such order as shall be reasonable and in conformity with law. In making any final decree on any appeal the court shall have full power to dispose of costs. (p. 532)

Section 86.—*New Evidence not to be Taken on Appeal.*—No evidence shall be received at the hearing on any appeal; but if any party shall satisfy the court that evidence has been discovered since the hearing before the commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the commission, with directions to take such after-discovered evidence, and, after consideration thereof, enter and file such order as shall in the opinion of the commission be reasonable and in conformity with law, from which order an appeal shall lie as in the case of any other final order. (pp. 532-534)

* * * * * * * * *

Section 88.—*Precedence of Appeals.*—All appeals from the orders of the commission to the said court shall take precedence upon the calendars of the said court over all other civil actions, except election cases. (p. 534)

* * * * * * * * *

Section 90.—*Appeals to Supreme Court.*—Any party to the record aggrieved by the final judgment, order or decree of the aforesaid court may appeal therefrom to the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and form as is provided in other cases of appeal to the Supreme Court. (p. 534)

* * * * * * * * *

Section 109.—*Laws Repealed.*—All laws or parts of laws in conflict herewith are hereby repealed.

Section 110.—It is hereby declared that an emergency exists for the immediate taking effect of this Act, and that the same shall therefore take effect five days after its approval.

Act of March 12, 1908.

Section 6 of the Act of March 12, 1908, "An Act concerning the Regulation of Public Service Corporations in Porto Rico", as amended by the Act of March 9, 1911 (*Revised Statutes and Codes of Porto Rico,* pp. 72-79), provided:

> "Whenever in the case of any public service corporation operating under a grant of any character whatsoever, any power has been reserved to the government or to any official authority or public body, whether such government, public body or official now is in existence or exercises authority in the Island of Porto Rico or not, to exercise any supervision or control over said corporation or to approve any tariff of charges, rule or regulation or condition or operation, or to amend, alter or repeal any such grant, then this power shall, on and after the date of passage of this act, be deemed to be vested in the Executive Council; and said Executive Council shall have all the powers heretofore so reserved to any government public body, or public official, and when, in such grant or grants, conditions have been imposed upon the grantee, and such conditions have not been faithfully observed or hereafter may not be faithfully observed, the Executive Council shall have power to annul or repeal said grant, or to take such other action as in its opinion is proper in respect to the matter, provided such conditions shall not have been fully complied with within the reasonable time allowed therefor."

APPENDIX II

OPINION OF CIRCUIT COURT OF APPEALS IN THE FORMER CASE

South Porto Rico Sugar Co. vs. *Munoz*, 28 F. (2d) 820.

OCTOBER TERM, 1928

No. 2271

SOUTH PORTO RICO SUGAR COMPANY, ET AL.,
Plaintiffs, Appellants,

vs.

MIGUEL A. MUNOZ, ET AL., *Defendants, Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PUERTO RICO.

BEFORE JOHNSON, ANDERSON AND HALE, JJ.

OPINION OF THE COURT.
OCTOBER 26, 1928.

ANDERSON, J. On May 28, 1928, the Public Service Commission of Porto Rico issued to appellants an order of notice to appear on June 4, 1928, and show cause why said Commission should not cancel a franchise granted, on March 19, 1901, to appellants' predecessors in title, by the Executive Council of Porto Rico, to use daily 20,000,000 gallons of the waters of Lake Guanica for irrigation, for the construction and operation of a private railroad to run in part over lands subject to public rights, and to construct and maintain a dock on the Bay of Guanica. Without appearing before the Commision, the appellants filed on

June 2, 1928, a bill in equity seeking an injunction to restrain the Commission from interfering in any way with the enjoyment of their powers under this franchise and from asserting any jurisdiction over the appellants in respect to said franchise. The court below sustained a motion to dismiss filed by the attorney general of Porto Rico, holding, in a well-reasoned and cogent opinion, both that the suit was premature, and that the Public Service Commission had jurisdiction. This decision was right on both points.

Courts have no general supervisory power over such tribunals as Public Service Commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon property rights. *American Coal Mining Co.* v. *Special Coal & Food Commission,* 268 Fed. 563; *Sayers* v. *Montpelier & Wells River R. R.,* 90 Vt. 201.

If we assume for the moment that this Public Service Commission has no jurisdiction, the issuance of an order of notice was no such assertion of authority or threat of irreparable injury as to warrant injunctive interference by the court. It would not follow that, on appearance and argument, the Commission would adhere to an erroneous view as to the nature and extent of its jurisdiction. The appellants' case in that regard is not supported by the cases relied upon by their learned counsel. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, and cases cited; *Work* v. *Louisiana,* 269 U. S. 250; *Gallardo* v. *Porto Rico Light & Power Co.,* 18 Fed. (2d) 918; *Benedicto* v. *West India & Panama Tel. Co.,* 256 Fed. 417.

Affirmation of the decree below (dismissing the bill) would doubtless be warranted on this ground alone. But it is plainly in the interest of the parties that we deal now, rather than possibly in a later suit, with the fundamental question of the jurisdiction of the Commission to maintain proceedings looking to the repeal, alteration or modification of the appellants' franchise.

Under the first Organic Act of Porto Rico,—the Foraker Act of April 12, 1900, 31 Stat. 77,—Congress provided for this recently acquired possession a legislative assembly, consisting of an elective lower chamber, and, in lieu of a senate, an Executive Council consisting of six heads of the executive departments appointed by the President. At the end of section 31 it was enacted:

> "Provided, however, that all laws enacted by the legislative assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same."

Section 32 reads:

> "That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including the power to . . . repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however,* That all grants of franchises, rights, privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the Governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

Franchises and laws were both thus required to be reported to Congress, which reserved the power to annul either or both.

Under the joint resolution of May 1, 1900, 31 Stat. 715, amending the Foraker Act of April 12, 1900, it was provided,

> "That all franchises, privileges or concessions granted under section 32 of said Act shall provide that the same shall be subject to amendment, alteration or repeal."

This was the familiar provision intended to meet the doctrine of the Dartmouth College case. Pursuant to these

powers, the Executive Council the next year (1901) granted the franchise in question, providing in Article XVII "that the franchises, privileges and concessions hereby granted shall be subject to amendment, alteration or repeal."

The same general power to annul laws enacted by the legislature of Porto Rico is retained in section 34 of the second Organic Act,—the Jones Act of March 2, 1917, 39 Stat. 951. In thus reserving in both Organic Acts power to annul laws enacted and franchises granted by the Porto Rican government, Congress acted in close analogy to its long-continued practice with relation to territories within the boundaries of the present United States,—prospectively states. Compare the Organic Act of Oregon, 9 Stat. sec. 6; of Minnesota, 9 Stat. 403; of New Mexico, 9 Stat. 446; of Utah, 9 Stat. 453; of Washington, 10 Stat. 172. The purpose obviously, both in Porto Rico and with our own territories, was to provide a quasi-guardianship during a probative period, over a developing political society, by requiring full reports (itself a sobering check) of all important performances of the local government, and by reserving power to annul any act sinister or dangerously foolish, in origin or in effect.

The new Organic Act substantially changed the form of government by providing for an elected Senate, having, in general, the legislative powers previously exercised by the abolished Executive Council. Compare section 12. It also provided in section 38 for a Public Service Commission, and enacted:

> "The said Commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council. Franchises, rights and privileges granted by the said commission shall not be effective until approved by the governor, and shall be reported to Congress, which hereby reserves the power to annul or modify the same."

Congress thus apparently vested full control over franchises, old and new, in the Public Service Commission.

But the Jones Act also vested in the Porto Rican legislature (Compare § § 25 and 37) general legislative authority over all matters of a legislative character not locally inapplicable or inconsistent with the provisions of the Organic Act. Under this power, the legislature, by Act No. 70, approved December 6, 1917 (Laws of Porto Rico, vol. 2, pp. 432-546), § 60, enacted:

> "Section 60. *Violation of existing franchises.* Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Executive Council and is now in force; *Provided, however,* That the Commission shall have the power to alter, amend, modify or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law."

This law was of course reported to Congress and it has not been annulled. This has some tendency to show approval by Congress.

> *Tiaco* v. *Forbes,* 228 U. S. 549, 558.
> *Fajardo Sugar Co.* v. *Holcomb,* 16 Fed. (2d) 92, 96.

It is thus clear, and appellants' learned counsel concedes, that the Jones Act or the legislature of Porto Rico, or both together, vested in the Public Service Commission all powers over franchises originally vested in the Executive Council.

The appellants' contention of no jurisdiction in that Commission, therefore, rests entirely on the proposition that Congress reserved to itself alone jurisdiction to repeal or amend franchises granted by the Executive Council. It grounds this proposition on the reservation contained in section 32 of the Foraker Act, *supra,*—"All franchises granted in Porto Rico shall be reported to Congress which hereby reserves the power to annul or modify the same." Necessarily this contention also asserts the invalidity of that portion of section 60 of the Act of Porto Rico, No. 70, approved December 6, 1917, *supra,* which explicitly pro-

vides that the Public Service Commission shall have the power to alter, amend or repeal franchises previously granted by the Executive Council.

We cannot adopt this construction of the general reservation by Congress of the power to annul all franchises and laws of the experimental local government set up by Congress in Porto Rico. We are constrained to hold that the purpose of Congress was, experimentally and gradually, to vest in the Porto Rican government the general powers of state governments, subject to the reserved power to annul or modify franchises and laws if and when Congress sees fit. The reservation of the power to annul franchises granted by the Executive Council is in the same general terms as the reservation of the power to annul all laws. It did not in 1901 exclude the power granted by fair and necessary implication to the Executive Council to modify or repeal franchises granted by that Council. The like reservation contained in the Jones Act does not exclude or cut down the power of the Public Service Commission to repeal or alter franchises granted by it. Like the power to repeal statutes, the body that creates may alter or destroy the creation.

The decree of the District Court is affirmed, with costs to the appellees in this court.

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IN THE

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

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I

Examination of respondents' brief in opposition rather emphasizes the correctness of our position and of the distinction drawn in our petition and brief between the kind of "reasonableness" which means the wisdom or expediency of administrative action within the acknowledged limits of executive power, and the other kind of "reasonableness" which has to do with the question whether or not in the exercise of police powers or other kindred powers the executive arm has reached beyond the proper limits of

its powers and has acted arbitrarily or capriciously so as to deprive any person of liberty or property without due process of law. The first kind of "reasonableness"—or "unreasonableness" on the contrary,—in the exercise of admitted executive power,—that is to say, any question of the wisdom or unwisdom or expediency or inexpediency of executive action within its own province,—can never be a judicial question, nor the subject of judicial review in a constitutional court of the United States. As was well said by the Circuit Court of Appeals for the First Circuit itself in its former opinion when this same controversy came up upon the initial bill for injunction (*South Porto Rico Sugar Co. and Russell & Co.* v. *Miguel A. Munoz, et al., Public Service Commission of Puerto Rico,* 28 F. (2d) 820, 821; Petition, Appendix II, p. 46):

> "Courts have no general supervisory power over such tribunals as Public Service Commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon property rights."

That is the only kind of "reasonableness",—and the only kind of question,—here involved. Russell & Co. had accepted a franchise subject, by its own terms, and by the express direction of the Act of Congress under which it was granted,[1] to cancellation at any time at the discretion of the Puerto Rican government. It was cancelled by the executive body,—the Public Service Commission,—clothed with the executive power for that purpose, after a full hearing and for administrative reasons which the Commission judged sufficient to require the cancellation; viz., that the franchise holder was improperly permitting the level of the lake to rise, in violation of the terms of the franchise, to such a height as to cause extensive flooding of the neighboring Municipality of Lajas.

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[1] Section 3 of Joint Resolution of Congress No. 23, May 1, 1900, 31 Stat. 715; quoted, petition for certiorari pp. 13-14.

If the exercise of such administrative discretion to cancel such a franchise in accordance with the express terms of the franchise itself, is subject to judicial review, then it means that the franchise is not really terminable at all in the discretion of the government in accordance with the terms upon which the grantee accepted it and upon which the Congress required that it should be granted; but is really perpetual; and can only be terminated upon the same basis as though it did not contain the clause reserving to the government the right to repeal it. But that cannot be true. Manifestly, the executive authority of the government has, under this clause reserving the power of cancellation, the same power to cancel it at discretion that a landlord has in any ordinary lease terminable at will or from month to month; and its termination by the executive authority is no more subject to judicial review than is the action of an ordinary landlord in exercising his discretion to terminate such a lease.

II

The cases cited in respondents' brief in opposition are not to the contrary. They really recognize the distinction between the two different classes of cases,—between the two kinds of "reasonableness". They are all cases dealing with questions of the executive power overstepping its province and attempting to exercise arbitrary or capricious powers and thereby depriving persons of liberty or property without due process of law. For example, in the first case which they cite (Respondents' brief, pp. 6-7), *Pacific Telephone and Telegraph Co.* v. *Kuykendall*, 265 U. S. 196, the question involved, as stated by Chief Justice Taft at the outset of the court's opinion (265 U. S., at pp. 197-198) was "of the *confiscatory character* of rates for telephone service within the State of Washington and in the cities of Seattle and Tacoma" (*italics supplied*), and the bill for injunction was rested on an allegation (*ib.* p. 198) "that the order of the Department of Public Works if enforced

would deprive the company of its property without due process of law, in violation of the Fourteenth Amendment"; the order being one forbidding the company from putting into effect "the increased rates which the company proposes in all parts of Washington except Spokane", and the company claiming (*ib.* p. 199) that the rates fixed by the Commission *"were confiscatory."* Manifestly, the question there involved was wholly different in character from the question here, which is simply of the "reasonableness", or rightness, or wisdom, of this Commission's exercise of the power, which the Circuit Court of Appeals agrees that it holds (R. 96), to repeal this franchise in strict accordance with its terms.[2]

---

[2] It is immaterial that the insular statute (Public Service Act, Sec. 85, petition for certiorari, Appendix I, p. 42) as interpreted by the insular courts (R. 54 and R. 80, 81), may give such executive power, to determine whether the Commission's order is "reasonable", to the insular courts, which are not constitutional courts of the United States. The legislative authority may invest Congressional courts with administrative powers (*Keller* v. *Potomac Electric Co., supra,* 261 U. S. 428, 444; *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, 468-469; *Radio Commission* v. *Nelson, supra,* 289 U. S. 266, 275); but not constitutional courts of the United States, such as the Circuit Court of Appeals.

(Whether the Legislature of Puerto Rico may validly invest the Puerto Rican insular courts with such executive power, in view of the provisions of the Organic Act for that Island distributing the governmental powers among the legislative, executive and judicial departments of the insular government in analogy to the distribution of such powers made by the Constitution for the federal government (*"Board of Control Cases", Springer and Agoncillo* v. *Philippine Islands,* 277 U. S. 189) is another question, not of present importance in this case, since the Public Service Commission's order was in fact approved by both of the insular courts, the District Court of San Juan and the Supreme Court of Puerto Rico.)

And in the second case cited by respondents (Brief, pp. 7-8) *Federal Radio Commission* v. *Nelson*, 289 U. S. 266, this court recognized the distinction between the two classes of cases, and that the judicial power is not concerned with any question of "the **wisdom or expediency** of the administrative action" (*ib.* p. 277). In that case the District Court of Appeals' reversal of the Radio Commission's order rested on the ground that the Commission's order was "in a legal sense **arbitrary and capricious**" (*ib.* p. 269). This court there expressly recognizes that a constitutional court of the United States may not review the exercise of executive discretion by administrative or executive authorities (*ib.* p. 275), and points out that under the 1930 amendment of the Federal Radio Act of 1927 (Act of July 1, 1930, c. 788, 46 Stat. 844, amending section 16 of the Act of 1927) the authority of the District Court of Appeals is limited "to questions of law" and to an examination of whether the Radio Commission's findings and orders "are *arbitrary or capricious*" (*ib.* pp. 275-276; *italics supplied*). That was the kind of question of "reasonableness" which this court in that case held it might review by virtue of its judicial powers under the Constitution, saying (*ib.* p. 276):

> "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass";

and that (*ib.* pp. 276-277)

> "The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an at-

> tempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. * * * Such an examination is not concerned with the weight or evidence or with the wisdom or expediency of the administrative action. * * *
>
> "* * * The controlling question is whether the function to be exercised by this Court is a judicial function, and if so, it may be exercised on an authorized appeal from the decision of an administrative body."

That is wholly in accordance with what was said in *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 444, cited in our original brief (p. 28) and with the general rule, upon which we rely, of the limits of the judicial power.

And the last case cited by respondents in their brief in opposition (pp. 8-9) *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin*, 238 U. S. 491, holds only, as quoted by the respondents themselves (brief, p. 9) from the headnote of that case, that

> "the reserved right of altering and amending the charter of a corporation does not confer mere arbitrary power or authorize the taking of the corporation's property without compensation;"

and that (p. 502) as this court had said in *Shields* v. *Ohio*, 95 U. S. 319, 324:

> "The alterations must be reasonable * * * and *consistent with the scope and object of the act of incorporation.*" (*Italics supplied*)

But that has nothing to do with the question here involved. This was not an alteration or amendment. It was an outright repeal, pursuant to a power expressly reserved in the franchise itself, which was one of the conditions upon which the grantee accepted it. As this court said in *Shields* v. *Ohio, supra*, 95 U. S. 319, 324:

> "It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is

consensus facit jus. It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State.

"Where an act of incorporation is repealed, few questions of difficulty can arise."

III

While it is true that the Circuit Court of Appeals says in its opinion (R. 102) that,

> "Under the circumstances disclosed by this record, the absolute cancellation of that part of the franchise pertaining to the use of the waters of the Lake [3] would, in our opinion, be an arbitrary and unreasonable act, if it involves, as it may have, a taking of a valuable property right acquired by the appellants under the franchise, viz: the right to take 20,000,000 gallons of water daily from Guanica Lake",

and that (R. 102-103),

> "To avoid future damages from flowage of lands in Lajas, it was only necessary to amend or modify the franchise by requiring the establishment of a guage above which the waters should not be permitted to be raised by the owner of the franchise, except during periods of extraordinary rains, and for a period sufficient to permit the excessive waters to be reduced in due course to the height of the guage so established";

yet the court, in saying that, apparently wholly fails to notice the important, *and controlling,* fact that this fran-

---

[3] The only part of the original tripartite franchise for irrigation, railroad, and wharf, in which Russell & Co., or these respondents, claim any ownership in this case; and the only part of the franchise in any way involved here, (R. 26-27; petition for certiorari, pp. 6-7; and order cancelling the franchise, R. 29-30).

chise, on its face, is terminable at any time at the discretion of the government;[4] and wholly fails to explain how, in view of that contractual right expressly reserved to the government, the cancellation could in any way be considered as an "arbitrary and unreasonable act", or the "taking of a valuable property right acquired by the appellants under the franchise", since it is axiomatic that "*consensus facit jus*" (*Shields* v. *Ohio, supra,* 95 U. S. 319, 324),—if the Circuit Court meant to use those words as indicating in any way that the action of the Commission was beyond its powers or was an illegal taking of property of Russell & Co. without due process of law. And if the court does not mean to say that, but means only to indicate its belief,—which is as far as its language really goes,—that the act of the Commission was "an arbitrary and unreasonable act" in the sense that, if the members of the court had been sitting as members of the Commission, they would have thought that the wiser or more reasonable thing to do would have been to modify the franchise in some such way as the court indicates, instead of cancelling it,—then that is simply an attempt to substitute the individual judgment of the members of the court for that of the members of the Public Service Commission on this question of administrative discretion, which was within the jurisdiction of the Commission, but wholly beyond judicial review by a constitutional court of the United States.

IV

It is believed unnecessary to add anything to what is said in Points III and IV (pp. 28-30) of our original brief.

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[4] Paragraph XVIII of the franchise (R. 15):

> "In accordance with Section 3 of Public Resolution No. 23, approved May 1st, 1900, it is hereby provided that the franchise, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal."

Manifestly, this franchise was in the nature of a local law; and plainly, as it seems to us, these six individuals have no more standing to act here on behalf of the *Sociedad en Comandita*, than have the stockholders of an ordinary corporation to act in relation to the corporation's property. As pointed out in our original brief (p. 30) these individuals took their appeal from the Supreme Court of Puerto Rico in this case six months after this court had held on March 13, 1933, in relation to this very same *Sociedad en Comandita*, Russell & Co., that it was to be treated as a corporation for the purposes of jurisdiction of the federal courts, and not as a partnership (*People of Puerto Rico* v. *Russell & Co.*, 288 U. S. 476).

It is submitted that, as urged in our original brief in support of the petition, the writ of certiorari should be granted, and respondents' appeal from the Supreme Court of Puerto Rico should be dismissed as moot, in the absence of the necessary party, Russell & Co., Sucrs. S. en C., or else that the judgment of the Supreme Court of Puerto Rico should be affirmed.

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DEC 12

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REPLY BRIEF FOR PETITIONER ON CERTIORARI

Certiorari was granted in this case, October 14, 1935. Petitioner advised the clerk of this court and opposing counsel that petitioner would stand upon its original petition and supporting brief, together with its "Reply Brief for Petitioner in Support of Petition for Certiorari", as its brief on certiorari, and accordingly respondents have filed their "Brief for Respondents Upon Review by Certiorari of Judgment of the Circuit Court of Appeals for the First Circuit." This is in reply to that brief.

In the Petition for Certiorari and Supporting Brief, as well as in the Reply Brief for Petitioner in Support of the Petition for Certiorari, filed prior to the granting of the writ of certiorari, page references to the record were

to the printed record of the Circuit Court of Appeals, copies of which were filed with the Petition for Certiorari. In the present brief, on the other hand, page references are to the Transcript of the Record as now printed by the clerk of this court.

I

Examination of respondents' brief shows that it, like their former brief in opposition to the petition for certiorari, rather emphasizes the correctness of our position and of the distinction drawn in our petition and brief between the kind of "reasonableness" which means the wisdom or expediency of administrative action within the acknowledged limits of executive power, and the other kind of "reasonableness" which has to do with the question whether or not in the exercise of police powers or other kindred powers the executive arm has reached beyond the proper limits of its powers and has acted arbitrarily or capriciously so as to deprive any person of liberty or property without due process of law. The first kind of "reasonableness" — or "unreasonableness" on the contrary, — in the exercise of admitted executive power,—that is to say, any question of the wisdom or unwisdom or expediency or inexpediency of executive action within its own province,—can never be a judicial question, nor the subject of judicial review in a constitutional court of the United States. As was well said by the Circuit Court of Appeals for the First Circuit itself in its former opinion when this same controversy came up upon the initial bill for injunction (*South Porto Rico Sugar Co. and Russell & Co.* v. *Miguel A. Munoz, et al., Public Service Commission of Puerto Rico,* 28 F. (2d) 820, 821; Petition, Appendix II, p. 46):

> "Courts have no general supervisory power over such tribunals as Public Service Commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon property rights."

But such a "general supervisory power" over the wisdom and fairness of the executive action of the Commission in exercising its power to repeal this franchise is just what the Circuit Court of Appeals did attempt to exercise in its present decision in this case; and that is the only kind of "reasonableness",—and the only kind of question,—here involved. Russell & Co. had accepted a franchise subject, by its own terms, and by the express direction of the Act of Congress under which it was granted,[1] to cancellation at any time at the discretion of the Puerto Rican government. It was cancelled by the executive body,—the Public Service Commission,—clothed with the executive power for that purpose, after a full hearing and for administrative reasons which the Commission judged sufficient to require the cancellation; viz., that the franchise holder was improperly permitting the level of the lake to rise, in violation of the terms of the franchise, to such a height as to cause extensive flooding of the neighboring Municipality of Lajas.

If the exercise of such administrative discretion to cancel such a franchise in accordance with the express terms of the franchise itself, is subject to judicial review, then it means that the franchise is not really terminable at all in the discretion of the government in accordance with the terms upon which the grantee accepted it and upon which the Congress required that it should be granted; but is really perpetual; and can only be terminated upon the same basis as though it did not contain the clause reserving to the government the right to repeal it. But that cannot be true. Manifestly, the executive authority of the government has, under this clause reserving the power of cancellation, the same power to cancel it at discretion that a landlord has in any ordinary lease terminable at will or from month to month; and its termination by the executive au-

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[1] Section 3 of Joint Resolution of Congress No. 23, May 1, 1900, 31 Stat. 715; quoted, petition for certiorari pp. 13-14.

thority is no more subject to judicial review than is the action of an ordinary landlord in exercising his discretion to terminate such a lease.

II

Such a reservation of power in the government to repeal it, embodied in the franchise itself,

> "places under legislative control all rights, privileges and immunities derived by its charter directly from the State". (*Tomlinson* v. *Jessup,* 15 Wall. (82 U. S.) 454, 459.)

Its very purpose is (*Tomlinson* v. *Jessup, supra,* at p. 458; *Stanislaus County* v. *San Joaquin C. & I. Co.,* 192 U. S. 201, 211):

> "To prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference";

the reservation of the right to repeal, alter or amend the franchise being **"itself a part of that contract"** (*Covington* v. *Kentucky,* 173 U. S. 231, 238, quoted and followed in *Stanislaus County* v. *San Joaquin C. & I. Co., supra,* 192 U. S. 201, 212-213; and see also to the same effect *Knoxville Water Co.* v. *Knoxville,* 189 U. S. 434). This court said in *Greenwood* v. *Freight Co.,* 105 U. S. 13, 20-21, that:

> "Mr. Justice Story in his concurring opinion in the Dartmouth College Case" (*Trustees of Dartmouth College* vs. *Woodward,* 4 Wheat. 518, 708, 712) "suggested that when the legislature was enacting a charter for a corporation, *a provision in the statute reserving to the legislature the right to amend or repeal it, must be held to be a part of the contract itself.* And the subsequent exercise of the right would be in accordance

with the contract, and could not, therefore, impair its obligation. * * * (p. 20) * * * (*Italics supplied*)

"This history of the reservation clause in acts of incorporation supports our proposition that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter is lost by its repeal. (p. 21) * * *

"* * * It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case." (p. 22)

Speaking by Mr. Justice Holmes, this court said in *Ramapo Water Co.* v. *New York,* 236 U. S. 579, 583:

"The charter of the company could, of course, be repealed without impairing the obligation of a contract, as the right was reserved, as usual, in the Constitution of the State. *Calder* v. *Michigan,* 218 U. S. 591";

and in the *Calder* case (*Calder* v. *Michigan, supra,* 218 U. S. 591, 598-599), this court said:

"The defendants now, on the ground that there are limits even to the operation of a reserved power to repeal, argue that we should consider these allegations" (of unfair motives of the Mayor and city authorities in passing the repealing ordinance)." *But we do not inquire into the knowledge, negligence, methods or motives of the legislature if, as in this case, the repeal was passed in due form. United States* v. *Des Moines Navigation & Railway Co.,* 142 U. S. 510, 544. The only question that we can consider is whether

there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power that the charter expressly reserves.

"The charter provides that 'The legislature may at any time hereafter amend or repeal this act.' * * *. By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject, not paramount, to the proviso for repeal, as is shown by a long line of cases. *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Bridge Co.* v. *United States*, 105 U. S. 470; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 313, 338, 340; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 353, 354; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437, 438; *Manigault* v. *Springs*, 199 U. S. 473, 480. It would be a waste of words to try to make clearer than it is on its face the meaning and effect of this reservation of the power to repeal."

III

The cases cited by respondents are not to the contrary. They really recognize the distinction between the two different classes of cases,—between the two kinds of "reasonableness". They are all cases dealing with questions of the executive power overstepping its province and attempting to exercise arbitrary or capricious powers and thereby depriving persons of liberty or property without due process of law. For example, in the first case which they cite (Respondents' brief, pp. 20-21), *Pacific Telephone and Telegraph Co.* v. *Kuykendall*, 265 U. S. 196, the question involved, as stated by Chief Justice Taft at the outset of the court's opinion (265 U. S. at pp. 197-198) was "of the *confiscatory character* of rates for telephone service within the State of Washington and in the cities of Seattle and Tacoma (*italics supplied*), and the bill for injunction was rested on an allegation (*ib.* p. 198) "that the order of the Department of Public Works if enforced would deprive the

company of its property without due process of law, in violation of the Fourteenth Amendment", the order being one forbidding the company from putting into effect "the increased rates which the company proposes in all parts of Washington except Spokane", and the company claiming (*ib.* p. 199) that the rates fixed by the Commission "*were confiscatory.*" Manifestly, the question there involved was wholly different in character from the question here, which is simply of the "reasonableness", or rightness, or wisdom, of this Commission's exercise of the power, which the Circuit Court of Appeals agrees that it holds (R. 86), to repeal this franchise in strict accordance with its terms.[2]

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[2] It is immaterial that the insular statute (Public Service Act, Sec. 85, petition for certiorari, Appendix I, p. 42) as interpreted by the insular courts (R. 50 and R. 73, 75) may give such executive power, to determine whether the Commission s order is "reasonable", to the insular courts, which are not constitutional courts of the United States. The legislative authority may invest Congressional courts with administrative powers (*Keller* v. *Potomac Electric Co., supra,* 261 U. S. 428, 444; *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, 468-469; *Radio Commission* v. *Nelson, supra,* 289 U. S. 266, 275); but not constitutional courts of the United States, such as the Circuit Court of Appeals.

(Whether the Legislature of Puerto Rico may validly invest the Puerto Rican insular courts with such executive power, in view of the provisions of the Organic Act for that Island distributing the governmental powers among the legislative, executive and judicial departments of the insular government in analogy to the distribution of such powers made by the Constitution for the federal government (*"Board of Control Cases", Springer and Agoncillo* v. *Philippine Islands,* 277 U. S. 189) is another question, not of present importance in this case, since the Public Service Commission's order was in fact approved by both of the insular courts, the District Court of San Juan and the Supreme Court of Puerto Rico.)

And in another case cited by respondents (Brief, pp. 23-24, and long excerpt in Appendix to Respondents' Brief, pp. 88-93), *Federal Radio Commission* v. *Nelson*, 289 U. S. 266, this court recognized the distinction between the two classes of cases, and that the judicial power is not concerned with any question of "the **wisdom or expediency** of the administrative action" (*ib.* p. 277). In that case the District Court of Appeals' reversal of the Radio Commission's order rested on the ground that the Commission's order was "in a legal sense **arbitrary and capricious**" (*ib.* p. 269). This court there expressly recognizes that a constitutional court of the United States may not review the exercise of executive discretion by administrative or executive authorities (*ib.* p. 275), and points out that under the 1930 amendment of the Federal Radio Act of 1927 (Act of July 1, 1930, c. 788, 46 Stat. 844, amending section 16 of the Act of 1927) the authority of the District Court of Appeals is limited "to questions of law" and to an examination of whether the Radio Commission's findings and orders "are *arbitrary or capricious*" (*ib.* pp. 275-276; *italics supplied*). That was the kind of question of "reasonableness" which this court in that case held it might review by virtue of its judicial powers under the Constitution, saying (*ib.* p. 276):

> "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. *These are questions of law* upon which the Court is to pass"; (*Italics supplied*)

and that (*ib.* pp. 276-277)

> "The provision that the Commission's findings of fact, if supported by substantial evidence, shall be con-

clusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. * * * Such an examination is not concerned with the weight or evidence or with the wisdom or expediency of the administrative action. * * *

"* * * *The controlling question is whether the function to be exercised by this Court is a judicial function,* and if so, it may be exercised on an authorized appeal from the decision of an administrative body." (*Italics supplied*)

That is wholly in accordance with what was said in *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 444, cited in our original brief (p. 28) and with the general rule, upon which we rely, of the limits of the judicial power.

Respondents also cite (*Brief*, pp. 26-27) *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin*, 238 U. S. 491, which holds only, as quoted by the respondents themselves (brief, pp. 26-27) from the headnote of that case, that

"the reserved right of altering and amending the charter of a corporation does not confer mere arbitrary power or authorize the taking of the corporation's property without compensation;"

and that (p. 502) as this court had said in *Shields* v. *Ohio*, 95 U. S. 319, 324:

"The alterations must be reasonable * * * and *consistent with the scope and object of the act of incorporation.*" (*Italics supplied*)

But that has nothing to do with the question here involved. This was not an alteration or amendment. It was an outright repeal, pursuant to a power expressly reserved in the franchise itself, which was one of the conditions upon which the grantee accepted it. As this court said in *Shields* v. *Ohio, supra*, 95 U. S. 319, 324:

> "It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is *consensus facit jus*. It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State.
>
> "Where an act of incorporation is repealed, few questions of difficulty can arise."

IV

While it is true that the Circuit Court of Appeals says in its opinion (R. 92) that,

> "Under the circumstances disclosed by the record, the absolute cancellation of that part of the franchise pertaining to the use of the waters of the Lake [3] would, in our opinion, be an arbitrary and unreasonable act, if it involves, as it may have, a taking of a valuable property right acquired by the appellants under the franchise, viz: the right to take 20,000,000 gallons of water daily from Guanica Lake",

and that (R. 92),

> "To avoid future damages from flowage of lands in Lajas, it was only necessary to amend or modify the franchise by requiring the establishment of a gauge above which the waters should not be permitted to be raised by the owner of the franchise, except during periods of extraordinary rains, and for a period sufficient to permit the excessive waters to be reduced in due course to the height of the gauge so established";

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[3] The only part of the original tripartite franchise for irrigation, railroad, and wharf, in which Russell & Co., or these respondents, claim any ownership in this case; and the only part of the franchise in any way involved here, (R. 25; petition for certiorari, pp. 6-7; and order cancelling the franchise, R. 27-28).

yet the court, in saying that, apparently wholly fails to notice the important, *and controlling,* fact that this franchise, on its face, is terminable at any time at the discretion of the government;[4] and wholly fails to explain how in view of that contractual right expressly reserved to the government, the cancellation could in any way be considered as an "arbitrary and unreasonable act", or the "taking of a valuable property right acquired by the appellants under the franchise", since it is axiomatic that *"consensus facit jus"* (*Shields* v. *Ohio, supra,* 95 U. S. 319, 324),—if the Circuit Court meant to use those words as indicating in any way that the action of the Commission was beyond its powers or was an illegal taking of property of Russell & Co. without due process of law. And if the court does not mean to say that, but means only to indicate its belief,—which is as far as its language really goes,—that the act of the Commission was "an arbitrary and unreasonable act" in the sense that, if the members of the court had been sitting as members of the Commission, they would have thought the wiser or more reasonable thing to do would have been to modify the franchise in some such way as the court indicates, instead of cancelling it,—then that is simply an attempt to substitute the individual judgment of the members of the court for that of the members of the Public Service Commission on this question of administrative discretion, which was within the jurisdiction of the Commission, but wholly beyond judicial review by a constitutional court of the United States.

"It is true that the charter of the company when accepted by the corporators constituted a contract be-

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[4] Paragraph XVIII of the franchise (R. 13):

"In accordance with Section 3 of Public Resolution No. 23, approved May 1st, 1900, it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal."

tween them and the State, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character." (The amendment to which reference is here made was an amendatory act of the Legislature of South Carolina, passed in December, 1855, amending the charter of the Northeastern Railroad Company so as to exempt its real estate from taxation during the continuance of the charter.) "And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. *The original corporators, or subsequent stockholders, took their interests with the knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature.* The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation."

Tomlinson v. *Jessup, supra,* 15 Wall. (82 U. S.) 454, 457-458 (FIELD, J.).

Further on in the same opinion MR. JUSTICE FIELD speaking for the Court said (at p. 459):

"Immunity from taxation, constituting in these cases a part of the contract of the government, is, by the reservation of power such as is contained in the law of 1841, *subject to be revoked* equally with any other provision of the charter *whenever the legislature may deem it expedient for the public interests that the revo-*

> *cation shall be made.* The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State." (*Italics supplied*)

V

There is an essential difference between outright "repeal" and "amendment".

A. Respondents say (Brief, p. 31, Heading) that there is "no sound distinction between a repeal and an amendment", and seek to apply to the *repeal* of this franchise the acknowledged rule with relation to *amendments* of franchises that the right to *alter or amend* "is not without limits", and that the alteration "must be reasonable", "must be made in good faith, and be consistent with the scope and objects of the act of incorporation", and that "Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration". *Shields* v. *Ohio, supra,* 95 U. S. 319, 324-325; *Berea College* vs. *Kentucky,* 211 U. S. 45, 57; *Fair Haven R. R. Co.* vs. *New Haven,* 203 U. S. 379, 388-389; *C. M. & St. P. R. Co.* vs. *Wisconsin,* 238 U. S. 491, 501-502; *Looker* vs. *Maynard,* 179 U. S. 46, 52; *Stearns* vs *Minnesota,* 179 U. S. 223, 259; *Sinking Fund Cases,* 99 U. S. 700, 720; *Stanislaus County* vs. *San Joaquin C. & I. Co.,* 192 U. S. 201, 213. And the Circuit Court of Appeals plainly lost sight of the difference between amendment and outright repeal, because the only cases it cites in support of the above quoted statement in its opinion (R. 92) that

> "the absolute cancellation of that part of the franchise pertaining to the use of the waters of the Lake would, in our opinion, be an arbitrary and unreasonable act, if it involved, as it may have, a taking of a valuable property right acquired by the appellants under the franchise",

are cases relating solely to *amendments* of franchises,[5] and not to "absolute cancellation" at all.

B. *But the essential distinction between "amendment or alteration" and outright "repeal" is clearly marked, and rests upon fundamental reasons.*

The basic characteristics of the two classes of acts are wholly different. "Repeal" or "revocation" or "cancellation" is the act of a single party, requiring no concurrence, and no further action by the other party. It simply puts an end to the contract or franchise, leaving nothing further to be done under it by the other party. But "amendment" or "alteration", on the other hand, is essentially bi-lateral in its nature, and it does require affirmative action by the other party in continuing to carry out the contract or franchise as thus altered or amended. And if it be an "alteration" or "amendment" of a franchise, pursuant to a reserved power to "alter or amend", by government action, without consulting the franchise holder, it amounts to forcing upon him, against his will, and expecting him to carry out, perhaps for many years to come, a new contract, different from that to which he had agreed in accepting the contract, and imposing on him different duties and obligations. That is a very different thing from simply ending it and releasing him. He may well insist that he cannot be required to accept such new contract, and to undertake such new duties and obligations, unless the amendments thus imposed upon him are reasonably "consistent with the scope and objects" of the original contract or franchise, and that "sheer oppression and wrong cannot be inflicted" upon him "under the guise of amendment or alteration". And so the cases above cited, with relation

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[5] *Shields* vs. *Ohio, Berea College* vs. *Kentucky, Fair Haven & Westville R. R. Co. vs. New Haven,* and *C. M. & St. P. R. Co.* vs. *State of Wisconsin, supra* (*ante,* p. 13); and *Com. of Inland Fisheries* vs. *Holyoke Water Power Co.,* 13 Gray 239.

to "alterations and amendments", hold. (*Ante*, p. 13). And those are the cases relied upon by respondents (brief, pp. 26-30), and by the Circuit Court of Appeals (R. 92, *supra*).

C. *But those cases have nothing whatever to do with an outright repeal of a franchise, such as that here involved, under a reserved power to "repeal".* That is a wholly different thing.

No case has been cited, and it is believed that none can be found, placing any such limitation, or any limitation whatever, upon the executive power of the government, in its sole discretion, to exercise a power of outright "repeal" expressly reserved in a charter or franchise. And this court has directly repelled and overruled the suggestion that any such limitation upon a reserved power to "repeal" may be implied. *Calder* v. *Michigan*, 218 U. S. 591, 598-599, quoted, ante, pp. 5-6. *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, 540-542. *Greenwood* v. *Freight Co., supra*, 105 U. S. 13, 20-22. *Ramapo Water Co.* v. *New York, supra*, 236 U. S. 579, 583. And *confer* the dissenting opinion of JUSTICES DAY, MCKENNA, HUGHES and PITNEY, in *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 76-83, at pp. 78-80.

VI

The three questions put by the insular courts (District Court, R. 50; Supreme Court, R. 73) as the questions which they hold that the insular statute makes it their duty to answer upon an appeal from an order of the Public Service Commission, and which the Circuit Court of Appeals holds (Opinion, R. 85, 92) and respondents now contend (*Brief*, p. 26) the Circuit Court might properly consider upon appeal from the insular Supreme Court, are:

> "1. Whether the order appealed from, rendered by the Public Service Commission on March 8, 1929, is reasonable or not.
>
> "2. Whether said order is legal or not.

"3. Whether it has been based on incompetent evidence, affecting the decision and order of the Commission",

But those questions may be put at any time in relation to any act of the executive branch of the government, from the smallest to the greatest. And manifestly, as it seems to us, those questions belong in different categories. The two latter questions,—whether the order "is legal or not", and whether it was "based on incompetent evidence",—are judical questions, properly cognizable by the judicial power. (And *the question whether the order "is legal or not" comprehends the question of that kind of "reasonableness" or "unreasonableness" involved in determining whether or not it exceeds the limits of the executive power or deprives any person of life, liberty or property without due process of law; because, manifestly, if it offends in any such manner, it is not "legal".*)

But the remaining question,—the question numbered "1" as stated by the insular District Court as above quoted,—thus set off in contrast as a separate question over against the question whether the order is "legal" or not,—"Whether the order * * * is *reasonable* or not", plainly asks for something else, and is in another category. That question asks whether or not the act was a wise or considerate exercise of the executive discretion vested in the Commission; whether or not under the circumstances it was a "reasonable" way to solve the administrative problem which the Commission had before it. The insular courts apparently understood the insular statute as placing upon them the duty of thus reviewing the executive discretion of the Public Service Commission, and of determining whether or not its exercise of its executive discretion was "reasonable"; in the same way that an executive or administrative duty is placed upon the insular Supreme Court of reviewing the executive action of registrars of property by "administrative appeal" under Section 66 of

the insular Mortgage Law. Rev. Stats. and Codes of Puerto Rico, 1911, Par. 6750; and Act of March 1, 1902, Laws of 1902, p. 289, Rev. Stats. and Codes of 1911, Pars. 2180-2190. *Luce* v. *Registrar of Guayama,* 20 F. (2d) 115 (C. C. A.—I; June 16, 1927). That kind of administrative or executive power may, of course, be given to Congressional courts, such as the insular District and Supreme Courts (*Luce* v. *Registrar of Guyama, supra,* 20 F. (2d) at p. 116; *Keller* v. *Potomac Electric Power Co., supra,* 261 U. S. 428, 444; *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, 468-469; *Radio Commission* v. *Nelson, supra,* 289 U. S. 266, 275). But nevertheless the decisions of such Congressional courts on administrative or executive questions of that kind may not be reviewed on appeal, or otherwise, by a constitutional court of the United States, such as the Circuit Court of Appeals. *Luce* v. *Registrar of Guayama, supra; Keller* v. *Potomac Electric Co., supra.* And hence, in this case, the Circuit Court of Appeals was without power to review that portion of the decision of the insular Supreme Court dealing with that question of the executive "reasonableness" of the Commission's order.

It is not a question of form of procedure, or whether or not the insular courts, reviewing the executive "reasonableness" of the Commission's order, had power, if they thought it unwise or executively "unreasonable", to substitute their own order in its place, or only to reverse it and send it back to the Commission with directions to try again; or in what form or method whatsoever the question may be raised. *It is,* on the contrary, *a matter of the essential character of the question itself;* whether it is in its essence judicial, and so cognizable by the federal "Judicial Power"; or is in its essence executive or administrative, to be determined by the executive power. If it be the latter, then, no matter in what form the question be raised, and no matter in what method of procedure, it may not be considered by the judicial power. "And this separation

and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism." *Springer v. Philippine Islands*, 277 U. S. 189, 201.

> "It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." *Kilbourn* v. *Thompson*, 103 U. S. 168, 191.

As we have said, the essential difference between the several characters of the three questions put by the insular courts here, as above quoted (R. 50 and 73, *supra*), and all of which the Circuit Court of Appeals assumed it was its duty to examine,—and the clear cut distinction between the executive or administrative character of the first question, whether the Commission's order "is reasonable or not", as over against the true judicial character of the other two questions, whether the order "is legal or not" or is "based on incompetent evidence",—may be illustrated by applying them to any purely executive act, of the most ordinary, or of the gravest, character. Thus for example, with reference to an order of a Park Board to build a fence within the park or along its boundary, it may be asked whether the order is legal, that is, within the powers of the board, and whether it has been made in due form of law, or upon a proper hearing, as may be required by pertinent statutes or ordinances, and upon competent evidence if a hearing be required. Those are judicial questions, properly cognizable as such in any court clothed with jurisdiction to review the orders of the board. But, if the order to build the fence was legal, and was made in due form and upon proper hearing, then the further question whether it was "reasonable" or not, whether it would have been wiser

not to build the fence at all, or to build it in some other place, or to build the fence two feet higher or a foot lower, or with steel or concrete posts instead of wood posts, or to build a fence of wood pickets instead of a wire fence, are all questions of pure executive discretion, which,—(if the order is "legal", and made within the powers entrusted by law to the Park Board),—cannot be made the subject of review by the judicial power of the United States, in a constitutional court of the United States, in any form of procedure. And it is beyond the power of the Congress to invest the constitutional courts of the United States with jurisdiction to review such administrative questions. *Muskrat* v. *United States, supra,* 219 U. S. 346, 351-356. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 215 U. S. 216. *Gordon v. United States,* 117 U. S. 697, Appendix. *United States* v. *Ferreira,* 13 How. 40, 52. *Hayburn's Case,* 2 Dall. 409.

And so also in matters of the gravest import. For example, a similar set of three questions might be asked concerning Lee's order to Longstreet at Gettysburg for Pickett's charge. "Was it legal"; that is, was it within General Lee's powers as Commanding General? Was it in due form? And finally, was it "reasonable"? Manifestly, the first two questions are judicial in their nature and might, if properly arising in a case or controversy, be made the subject of judicial inquiry by the courts. But likewise plainly the last question, whether the order was "reasonable", is purely and simply an administrative or executive question, wholly beyond review by the judicial power in any form; and the fact that it might,—and did,—deprive many persons of property, of liberty, and of life, could not raise any judicial question of deprivation of life, liberty or property without due process of law, if the order was "legal", that is to say, within the powers legally vested in the Commanding General.

Such illustrations may go far afield; but the principle is always the same. If the act be within the scope of the

powers of the executive authority,—that is, if it be "legal", and if it be made in the manner and in the form prescribed by the pertinent laws, then it is not the subject of review by any other branch of the government, either by the legislature or by the courts; and whether "reasonable" or "unreasonable", whether wise or unwise, whether an act of the highest statesmanship, or the purest folly, it is beyond review by the judicial power. Historians may dispute to the end of time whether or not Lee's order to Longstreet was wise or "reasonable" or the reverse; but that kind of a question of "reasonableness" in an executive act or order can never be made the subject of review by the judicial power of the United States.

VII

The repeal of this franchise by the Public Service Commission of Puerto Rico, pursuant to the express power of "repeal" reserved in the franchise itself, was an exercise of pure executive power.

Respondents endeavor to avoid this proposition by contending that the Commission's order (R. 27-28) cancelling that portion of the original franchise held by Russell & Co.,

> —viz., that part of the original tripartite franchise to the Guanica Land Company for the railroad, the wharf, and the right to take water for irrigation from Lake Guanica, which had been transferred to Ensenada Estates, Inc., and by it in turn to Russell & Co.,—the part comprised in the first four paragraphs of the franchise (R. 8-10),—and which part of the franchise,—*and only that part, and nothing else,*—Russell & Co. claimed any interest in, by its answer before the Public Service Commission (R. 25),—

was not really a "repeal"; but was only in the nature of an "alteration or amendment" of the original franchise. Respondents say (Brief, p. 31, Heading):

"but we submit that cancellation of the water rights was in nature and effect an amendment of the entire integrated franchise within the meaning of the authorities quoted".

Respondents are trying, of course, to avail themselves of the rule stated in the cases cited in their brief, and in other cases to which reference is heretofore made (*ante,* pp. 13, 15) that, as contradistinguished from the unlimited character of the executive power of "repeal" under a reserved power in the franchise the power of "alteration or amendment" is "not without limits", and that such an "alteration or repeal" must be consonant with the scope and purpose of the original franchise intended to be still left in effect as thus modified,

VIII

But, on this record, it is perfectly plain that the cancellation of the franchise here involved was a true "repeal", and was not in the nature of "alteration or amendment".

The Circuit Court of Appeals treated it as an outright "repeal" or revocation of all of that part of the franchise in which Russell & Co. (or the individual respondents here, as its stockholders) had any interest whatever (R. 92); as did also the insular courts, both the District Court (R. 56, 60) and the insular Supreme Court (R. 65, 68). This was the only part of the franchise in which Russell & Co. (or these individual respondents as its stockholders) ever had or claimed any interest whatever. The original franchise of March 19, 1901, to the Guanica Land Company (R. 8-14) was for three separate things: *First,* To take not exceeding 20,0000,000 gallons of water a day from Guanica Lake (Pars. I-IV); *Second,* For a standard gauge private railway (Pars. V-VII), with respect to which, however, the Executive Council reserved the right (Par. XXII) to declare the company, its successors and assigns "a common carrier", and to extend the use of the railroad to the

general public; and, *Third,* For a dock or wharf in the Bay of Guanica, if the consent of the Secretary of War should be obtained, as a private wharf (Par. VIII-X), but with the like reserved right to the Executive Council in relation to the wharf as in relation to the railroad (Par. XXII, *supra*), to declare the "Company, its successors and assigns, a common carrier", and to extend the use of the wharf to the general public; and also with a provision (Par. XII), as to both the railway and the wharf, for their free use for certain government purposes.

The entire franchise was transferred by the original grantee to another corporation, "Guanica Centrale" and the assignment was approved by the Executive Council of Puerto Rico on October 31, 1901; but no subsequent assignment of the franchise or of any part of it was ever approved or authorized by the Executive Council, or by its successor created by the present Organic Act of Congress of March 2, 1917, the Public Service Commission of Puerto Rico (R. 16). But Russell & Co. now claim (*Answer of Russell & Co. to the Rule to Show Cause before the Public Service Commission,* Par. I; R. 25) that on March 15, 1917, the corporation Guanica Centrale granted to Ensenada Estates, Inc., a Connecticut corporation

> "all of that part of said franchise and of the rights therein contained, referring to the use of certain waters of Guanica Lake for purposes of irrigation, that is, to be more specific, the rights contained under Paragraphs I and IV, inclusive, of said franchise";

and that Russell & Co.

> "is at present the owner of all that part of said franchise having to do with the use of water for purposes of irrigation";

that "the said assignments or grants were communicated to the Executive Council of Puerto Rico and to the Public Service Commission",

"and although it is true that they were not approved by said Council and Commission, such approval was unnecessary for their validity inasmuch as the franchise itself authorizes its assignment or grant."

And it is that entire part of the franchise thus claimed to have been granted to the Connecticut Corporation, Ensenada Estates, Inc., and by it in turn to Russell & Co., which was cancelled by the Public Service Commission's order of March 8, 1929 (*R.* 27-28) *here involved.* That is, the order cancelled the whole of that part of the franchise in which Russell & Co. had or claimed any interest whatever.

It was, therefore, as to Russell & Co. and as to every part of the franchise in which Russell & Co. had any interest, a complete "repeal". It left nothing whatever for Russell & Co. to do under the contract. It imposed no new duties or obligations on Russell & Co.; or on any holder of that part of the franchise. It ended it. It left nothing further to be done. It wholly released Russell & Co., and any other holders or claimants in or to that part of the franchise, from any further obligations under it. *That is the distinctive character of a "repeal",* as contra-distinguished from an "alteration or amendment". The latter does purport to impose new or changed duties or obligations upon the franchise holder, and to require him to continue to discharge them; and does not wholly release him from obligations to the government under the franchise. (*Ante,* pp. 14-15). This was, therefore, a true "repeal".

IX

It is immaterial that it was a repeal of but one of the three parts of the original franchise grant, which were in their nature distinct and separable.

By the separate grant of that part of the franchise concerning the water rights to the Connecticut corporation, Ensenada Estates, Inc., in March, 1917, and by the assign-

ment by it, in the following June, to Russell & Co., of that "water rights" part of the original franchise as a separate thing, and by Russell & Co.'s acceptance of it, *the parties voluntarily separated the original franchise into wholly separate parts; in effect, into separate franchises.* What became of the other parts of the original franchise does not appear in this record. It does not appear that Russell & Co. has any interest whatever in them; or that the holders of those other parts of the original franchise (if they are still in existence) have any interest of any kind in this "water rights" part, or any contract of any kind with Russell & Co. With the validity of this separation, or attempted separation of the original franchise into separate parts by the voluntary action of the parties without the consent of the Executive Council, or of the Public Service Commission, of Puerto Rico, we need not here concern ourselves. If it was valid, then it effected a complete separation of the original franchise into separate parts,—in effect, as we have said, into separate franchises. And the entire franchise held or ever claimed by Russell & Co. was repealed outright by the order of the Public Service Commission on March 8, 1929. And if the parties' attempted separation of the franchise into several separate holdings was not valid, and was ineffective, then, of course, Russell & Co. took nothing by it, and in that event neither Russell & Co. nor either of these respondents as its stockholders is injured in any way by the Public Service Commission's repealing order.

Respondents speak of a *"group";* of the "water rights and railroad and dock", *"closely integrated into a single franchise which could only be held and enjoyed by a limited group"* (*Brief,* p. 31); and, in their "Statement of the Case", of the "water, railroad and dock provisions" of the franchise as being *"closely interlocked and inter-dependent, and all rights are confined to the group 'said company, its successors and assigns'"* (*Brief,* p. 8); and

that (p. 10) the franchise "*was obviously intended to be, and has, as a matter of fact, been,* the basis of a large investment by the franchise holders in lands, railroad, sugar mill and dock, *constituting an integrated enterprise of great value to the franchise holders,*—and to Puerto Rico" (*Italics supplied*); and further that (*Brief,* pp. 10-11) Russell & Co., after the assignment to it of the "water rights" portion of the franchise

> "was and continues to be a member of the group designated throughout the franchise as 'The Guanica Land Company, its successors and assigns'. Of this group, the South Porto Rico Sugar Company is an interested member 'apparently having acquired rights under the franchise to the railroad and wharf' ".

The last phrase, as to the South Porto Rico Sugar Company, is quoted from the opinion of the Court of Appeals (R. 83). And that idea of an "integrated group"; and, apparently, as a consequence, that the rights of other members of that "group", holding some interest in other parts of the franchise, were in some way affected by the cancellation of the part of the original franchise claimed by Russell & Co., runs all through the thought of respondents in their "Statement of the Case" and their argument here, and that, accordingly the Commission's order cancelling the water rights part of the original franchise held by Russell & Co. amounted in some way to an "alteration or amendment" of the whole of the original franchise, instead of being simply (*as it, in fact, was*) an outright "*repeal*" of that part which had been transferred to Russell & Co., and with which alone the Commission was dealing, and that, therefore, in some way, the Commission's powers of outright repeal of the part of the original franchise held by Russell & Co. should be treated as limited by some consideration of its effect on the other parts of the original franchise, the railroad and the wharf,—in which Russell & Co. never had, and never claimed, any interest whatever.

X

But there is not one word in this whole record to support any such idea of an integrated "group". Not one syllable or letter. Absolutely nothing of the kind. The assignments of that portion of the original tripartite franchise relating to the water rights to the Connecticut corporation, Ensenada Estates, Inc., in March, 1917, and by the latter corporation to Russell & Co. in June of that year, as set out in Russell & Company's answer before the Public Service Commission (R. 25), were clean-cut and complete assignments, with no strings of any kind. There is neither allegation nor evidence in the record of any connection whatever remaining between Russell & Co. and any holders of any other part (either the railroad or the wharf) of the original franchise. Nothing about any contracts between them; nothing about any reserved rights between them; nothing as to any inter-company or "group" relations of any sort. They stand on this record as complete strangers to each other. If Russell & Co. took anything at all, it took it as a new and separate franchise in itself, for all of that part of the original franchise relating to the water rights. That was in its nature a complete and separable thing. It was wholly cancelled by the Commission's order. It was a complete "repeal". It was not in any respect a mere "alteration or amendment" of the franchise. It had nothing to do with the holders of any other parts of the original franchise, either with the railroad or the wharf. And they have nothing to do with it.

XI

In determining whether or not a case presents a question of "unreasonableness" or "reasonableness" of executive action within the meaning of an attempted stretch of executive power beyond its proper limits, or of deprivation of property without due process of law in violation of constitutional rights, which may present a judicial question for determination by the courts, the dividing line is indicated in opinions of this court.

For example, in one of the cases cited by respondents (*Brief*, p. 22), *Porter* v. *Investors' Syndicate*, 286 U. S. 461, 468, it is said that the function of the State District Court under the State statute there involved "is not, strictly judicial", because it is not simply

> "to set aside a decision of the Commissioner if *arbitrary or unreasonable* AND HENCE *violative of constitutional rights*".

In other words, if the kind of alleged "unreasonableness" involved is not such a character as to be "violative of constitutional rights", then it falls into the other category of a question of executive "reasonableness" in the exercise of executive discretion.

And so this court said in *Radio Commission* v. *Nelson*, 289 U. S. 266, 278 (and from which respondents print a long excerpt as an appendix to their brief):

> "When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision *upon the legal question whether the Commission has acted within the limits of its authority*, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the judicial power". (*Italics supplied*)

XII

This court has marked the distinction between "repeal" of a franchise on the one hand, and its "alteration or amendment" on the other hand.

Thus in one of the cases cited by respondents, it was held that the reserved power to "alter or amend" did not include the power to "repeal". *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 72; where the court said of the reservation of the power to "alter or amend":

> "It does not reserve any right to revoke or repeal the ordinance, or to affect the rights therein granted".

In other words, the two things belong in different categories, although habitually joined together in the ordinary statutory reservation of the right to "alter, amend or repeal"; and the distinction was particularly marked in the *Owensboro* case by the fact that this court expressly distinguished (at p. 73) from that case, the case of *Greenwood* v. *Freight Co., supra,* 105 U. S. 13, on the very ground that in the *Greenwood* case the reservation there involved

> "was a plain unmistakeable reservation of the right to repeal at the pleasure of the State".

XIII

Respondents reiterate (*Brief,* p. 39) that: "From the beginning and at every stage of this litigation Russell & Company has pressed the point that the cancellation order deprived it of property without due process of law".

But, inasmuch as this cancellation was made pursuant to the express consent of the franchise holder embodied in the reserved power in the franchise itself to repeal it at the pleasure of the government, the exercise of such reserved right of repeal could never be a deprivation of property without due process of law. As this court said in *Shields* v. *Ohio,* 95 U. S. 319, 324, *supra,* there can be no vested right to be invaded by such a repeal pursuant to consent embodied in the franchise itself. *"Consensus facit jus".* (See also, *ante,* pp. 4-6, 11-13).

A direct answer to respondents' contention is found in the language of Mr. Justice Day in his dissenting opinion on behalf of the four dissenting Justices Day, McKenna, Hughes and Pitney, in *Owensboro* v. *Cumberland Telephone Co., supra.,* 230 U. S. 58, 81-82, which, although occurring in a dissenting opinion, states the unquestioned rule:

> "It is also said that the exercise of the reserved right to repeal in cases like this will have the effect to destroy contract rights, upon the strength of which large investments may have been made. But this argu-

ment overlooks the proposition that, if the grant was made subject to the right to revoke by subsequent action of the authority which made the grant, then no contract was entered between the parties beyond the control of the reserved power of the municipality, for as Mr. Justice Miller said in the *Greenwood* v. *Freight Co. Case,* under such 'a provision * * * reserving to the legislature the right to amend or repeal it must be held to be part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation.' So, if this limitation in fact existed, the right to repeal was inherent in the authority which made the grant, and the grantee is conclusively presumed to be aware of this limitation, and to make his investments subject to the exercise of the reserved right. *Calder* v. *Michigan, supra.* Moreover, if limited grants are to be construed into perpetuities then the control over streets for railway, telephone and other kindred enterprises of enormous value are granted to private corporations without compensation for the use of such valuable rights which belong to the municipality. Recent cases in this court have shown the great value of such privileges, and that investors are found who are willing to pay for the privilege of using the public streets for these purposes."

And so also, it was said in *Tomlinson's* v. *Jessup, supra,* 15 Wall. (82 U. S.) 454, 457-458:

"The original corporators, or subsequent stockholders, took their interests with the knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature."

Counsel say (*Respondents' Brief,* p. 40) that the Guanica Land Company,

"would not have dreamed of accepting the franchise, unless it had believed and expected that the governmental authorities empowered to exercise the reserved

> power to amend or repeal the franchise would exercise it reasonably".

In other words, they relied upon the fairness and consideration of the executive authorities clothed with that executive power of amendment or repeal. They must still so rely; and this record shows no reason for questioning the fairness or wisdom of the Commission, or any reason why Russell & Co. should not continue to rely upon its executive discretion, as its predecessor, the Guanica Land Company, agreed to do in accepting the franchise. The Commission's order shows on its face (R. 27-28) an intention to deal fairly with the franchise holder. It contains an invitation, notwithstanding the reasons which seemed to the Commission to make the repeal necessary, for the franchise holder to submit to the Commission.

> "specific data with regard to the highest level of the waters of the lake, as well as the plans of any other works, in order that this level may be permanently kept,"

with a view, of course, to a new franchise.

XIV

Respondents' contention (*Brief*, p. 71) that Russell & Co. is not,—and that its predecessor, the Guanica Land Co., was not,—a "public service corporation", is wholly immaterial.

The contention was made in the Circuit Court of Appeals, and is answered in the opinion of that court (R. 86-89) overruling it. And, as the Circuit Court of Appeals there says (R. 87), if Russell & Co. was not to be considered as a "public service corporation" to the extent at least of being clothed with the powers it assumed to exercise in accepting the assignment of this franchise from its predecessor corporation in 1917, in the matter of holding back and taking the water from the sources in Guanica Lake, then it would necessarily follow that,

> "the errors assigned and the questions argued as to the jurisdiction and power of the Public Service Commission to revoke the concession, or any of the other questions sought to be raised, would be purely academic and unworthy of any consideration, for neither the Executive Council nor the Public Service Commission would have authority to grant such a concession, and Russell & Company would have acquired nothing by the grant, and there would be nothing to revoke."

XV

And likewise the contention made by Respondents in Point V (pp. 60, et seq.) of their Brief that

> "on a proper construction of the pertinent acts of Congress, the Public Service Commission has no power or jurisdiction to make the order appealed from",

because, as respondents contend (*Brief*, p. 61),

> "The power to amend, alter or repeal the Guanica franchise—as well as the power to modify and annul—was by the Organic Act of 1900 and the joint resolution and the franchise itself reserved solely to Congress and never vested in the Executive Council",

was overruled by the Circuit Court of Appeals, both in its opinion in the present case (R. 86, 88-90) and also in its opinion in the earlier injunction suit involving the validity of this same order of the Commission, *South Porto Sugar Co.* v. *Munoz*, 28 F. (2d) 820 (copy is Appendix II [pp. 45-50] to our original brief), where the Circuit Court of Appeals pointed out (28 F (2d) at p. 822; our original brief, p. 49) that appellants' (*respondent's*) contention there rested, as it does here (*Brief*, p. 61, *et seq.*) upon the supposed ground that the Congress, by the *proviso* at the end of section 32 of the former Organic Act for Puerto Rico, the Foraker Act of April 12, 1900, 31 Stat. 77, 83-84 (our original brief, p. 13), that all grants of franchises,

rights, privileges, or concessions of a public or quasi-public nature "shall be reported to Congress, *which hereby reserves the power to annul or modify the same*" (*Italics supplied*), amounted in effect to the Congress reserving

> "to itself alone jurisdiction to repeal or amend franchises previously granted by the Executive Council."

The Circuit Court of Appeals there said,—*and as it is submitted entirely correctly* (*South Porto Rico Sugar Co.* v. *Munoz, supra,* 28 F. (2d) 820, 822; our former brief, p. 50):

> "We cannot adopt this construction of the general reservation by Congress of the power to annul all franchises and laws of the experimental local government set up by Congress in Porto Rico. We are constrained to hold that the purpose of Congress was, experimentally and gradually, to vest in the Porto Rican government the general powers of state governments, subject to the reserved power to annul or modify franchises and laws if and when Congress sees fit. The reservation of the power to annul franchises granted by the Executive Council is in the same general terms as the reservation of the power to annul all laws. It did not in 1901 exclude the power granted by fair and necessary implication to the Executive Council to modify or repeal franchises granted by that Council. The like reservation contained in the Jones Act does not exclude or cut down the power of the Public Service Commission to repeal or alter franchises granted by it. Like the power to repeal statutes, the body that creates may alter or destroy the creation."

And as above pointed out, the Circuit Court of Appeals adhered to that decision, in the present case (R. 86).

XVI

These six individual respondents are not the *Sociedad en Comandita,* Russell & Co. That *Sociedad* is not here; and these six individuals had no authority to maintain the appeal from the Supreme

Court of Puerto Rico to the Circuit Court of Appeals in this case. (Our original brief, Point IV, pp. 29-30.)

As there pointed out, the appeal was taken from the insular Supreme Court from its judgment of November 9, 1933, nearly eight months after this court had decided in the case of *People of Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, on March 13, 1933, that this very *Sociedad en Comandita,* Russell & Co., was to be treated as a corporation; and not as a partnership.

Respondents deal at length with this question in Point IV (pp. 48-59) of their brief; but, it is submitted, wholly fail to establish any rights in these six individuals to maintain this appeal, in the absence of the *Sociedad,* Russell & Co., which alone claims, or ever has claimed, any interest in the subject matter of this litigation.

The answer filed with the Public Service Commission, to the Rule to Show Cause (R. 24-27), is by the *Sociedad* itself, Russell & Co., Sucrs. S. en C. and claims title to the franchise (Par. I; R. 25) in the *Sociedad,* "the partnership appearing herein". It is true that the appeal to the insular District Court was taken (R. 1) in the name of the six individuals, "members of the civil agricultural partnership of Puerto Rico, Russell & Co., Sucrs. en C.", on April 8, 1929 (R. 8); and that the appeal to the Supreme Court of Puerto Rico on June 26, 1930, was taken (R. 63) by "the plaintiffs" in the District Court and was captioned in the insular Supreme Court in their names, although the Supreme Court said in its opinion (R. 65): "Russell & Co. appealed from that judgment to this court".

B*ut both of those appeals,* that from the Public Service Commission to the insular District Court on April 8, 1929, and that from the District Court to the insular Supreme Court on June 26, 1930, *were taken after the Circuit Court of Appeals had held* in *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500, 504-505, on March 8, 1922, followed by it in *Puerto Rico* v. *Russell &*

Co. (*Havemeyer*), 60 F. (2d) 10, 12-13, June 27, 1932, that the *Sociedad en Comandita* was to be treated as a partnership rather than a corporation,—(overruling in so doing the earlier decision of the Supreme Court of Puerto Rico in *People* v. *Rivera Zayas,* 29 Puerto Rico Rep. 423, 430, of May 27, 1921, and what had theretofore apparently been the established rule in Puerto Rico as to the juridical personality of such a *Sociedad*). Those decisions of the Circuit Court of Appeals stood unreversed at the times both of those appeals were taken in this case, on April 8, 1929 (R. 8), and on June 26, 1930 (R. 63); and, of course, were to be respected. And in apparent accordance with those decisions of the Circuit Court of Appeals, these six individuals, alleging themselves to be all the partners of the *Sociedad,* "a civil agricultural partnership," came into court on behalf of the partnership, both in the appeal from the Public Service Commission to the insular District Court on April 8, 1929 (R. 1, 2, 8, *supra*), and on the appeal from that court to the insular Supreme Court on June 26, 1930 (R. 63, 64, *supra*).

But before the appeal was taken from the insular Supreme Court to the Circuit Court of Appeals from that Supreme Court's judgment of November 9, 1933 (*Appeal perfected December* 28, 1933; R. 75) the picture had entirely changed. Eight months prior to that time, on March 13, 1933, this court, in its decision in *Puerto Rico* v. *Russell & Co., supra,* 288 U. S. 476, 478-482, had reversed the decision of the Circuit Court of Appeals in the same case (*Puerto Rico* v. *Russell & Co., supra,* 60 F. [2d] 10), and had expressly overruled the doctrine, theretofore held by that court, that the *Sociedad en Comandita* was to be treated as a mere partnership, and had held,—and in relation to this very *Sociedad en Comandita,* Russell & Co.,—that it was in effect a corporation, and was to be treated as such; and had expressly cited,—and, in effect, reinstated (at p. 481),—the earlier doctrine of the Supreme Court of Puerto Rico enunciated in *People* v. *Rivera Zayas, supra,* 29 Puerto Rico Rep. 423 430, that:

"Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant."

That was the law when these individual respondents,—and not the *Sociedad* itself,— assumed to appeal to the Circuit Court of Appeals from the judgment of the Supreme Court of Puerto Rico of November 9, 1933, in this case.

And the decision of this court was not merely, as respondents appear to assume (*Brief*, pp. 55, 58) that the *Sociedad* was to be treated as a corporation for the purposes of federal jurisdiction; but it was, on the contrary, that the *Sociedad en Comandita* actually *is in substance and effect a corporation, with all the essential characters of a corporation,* and is not essentially a partnership; and that it is for that reason,—because it really is a corporation,— that it is to be treated like other corporations for the purposes of federal jurisdiction, as well as for other purposes. This court there said (*Puerto Rico* v. *Russell & Co., supra,* at pp. 480-482):

"Therefore to call the *sociedad en commandita* a limited partnership in the common law sense, as the respondents and others have done, is to invoke a false analogy. In the law of its creation the *sociedad* is consistently regarded as a juridical person. It may contract, own property and transact business, sue and be sued in its own name and right. Civil Code (1930) Secs. 27 to 30; Code of Commerce (1930) Secs. 95, 97, 123, 124. Its members are not thought to have sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant. See *People* v. *Rivera Zayas,* 29 P. R. 423, 430. It is created by articles of association filed as public records. Code of Commerce, Secs. 95, 98; compare Civil Code, Secs. 1558, 1560. Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. Civil Code, Secs. 1591, 1596, 1598; Code of Commerce, Sec. 141. Powers of management may be

vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*. Civil Code, Secs. 1583, 1589; Code of Commerce, Secs. 102, 106, 125. Its members are not primarily liable for its acts and debts (Code of Commerce, Sec. 156), and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital. Civil Code, Sec. 1590; see *Quintana Bros. & Co.* v. *S. Ramirez & Co.*, 22 P. R. 707, 716. Although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them (Code of Commerce, Secs. 125, 156; see *Successors of M. Lamadrid & Co.* v. *Torrens, Martorell & Co.*, 28 P. R. 824), this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states. Compare *Louisville, C. & C. R. Co.* v. *Letson, supra,* 557, 558; *Liverpool Insurance Co.* v. *Massachusetts,* 10 Wall. 566, 575. These characteristics under the Codes of Puerto Rico give content to their declaration that the *sociedad* is a juridical person. That personality is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law."

That reinstated the ancient rule of the civil law and the earlier doctrine of the Supreme Court of Puerto Rico, including particularly the decision of that court in *People* v. *Rivera Zayas, supra,* 29 P. R. Rep. 423, 430, expressly cited by this court (at p. 481) that the members of the *Sociedad*

> "are not thought to have a sufficient personal interest in a suit brought against the entity to enable them to intervene as parties defendant."

And in the face of that express decision of this court, these individual defendants attempt to maintain this ap-

peal, taken eight months afterwards. The Circuit Court of Appeals disposed of this objection, and sustained its jurisdiction over this appeal, by saying (R. 81):

> "The order to show cause" (by the Public Service Commission; R. 15) "was issued to 'Russell & Co., Sucrs. en C., a limited partnership'. That company is here."

But the court was mistaken. That company is not "here". Here are only six individuals claiming to be all of its members or stockholders. But they have no power to represent the corporation in this suit. A judgment for or against them cannot bind it. Russell & Co. well knew how to appear in the insular courts and to take an appeal in its proper corporate personality, had it desired so to do. The precedents and cases collected in the Appendix to this brief (*infra,* pp. 39-41) amply demonstrate that. Some of them are cases where this very *Sociedad,* Russell & Co., had itself appeared in its proper corporate personality.

CONCLUSION

As in our original brief, it is submitted that, because of the absence of the necessary party, Russell & Co., Sucrs. S. en C., the judgment of the Circuit Court of Appeals should be reversed and the case remanded to that court with directions to dismiss the appeal from the Supreme Court of Puerto Rico for want of jurisdiction, or else that the judgment of the Supreme Court of Puerto Rico should be affirmed.

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APPENDIX

Juridical Personality of "*Sociedad en Comandita,* appearance in the insular courts in its own name as a juridical person.

Russell & Co., has at least three times before been in the Supreme Court of Puerto Rico. See

Russell & Co. v. *Benedicto,* 26 P. R. R. (Spanish text, p. 517; English text, p. 456).
Carreno v. *Russell & Co.,* 32 P. R. R. (Spanish text, p. 257; English text, p. 248).
Almodovar v. *Russell & Co.,* 34 P. R. R. (Spanish text, p. 94; English text, p. 90).

In each of these cases it appeared in its own name as a juridical entity.

A.—It is a long established rule in Puerto Rico that such a "*Sociedad en Comandita*" is a *juridical person,* with the capacity to make contracts and to sue and be sued in its own name.

Art. 116, Code of Commerce (Par. 7675, Comp. Laws of Porto Rico, 1911). (*Particularly clause 2, Spanish text*).
People v. *Zayas,* Dist. Judge, 29 Porto Rico Rep., 423, 428-431, 432 (WOLF, J.; involving this very concern, Russell & Co., S. en C.).

And see, also,

Clause 2, Art. 122, Code of Commerce (Par. 7681, Comp. Laws, 1911).
Sub-Section 2 of Section 27, Civil Code of Porto Rico Sections 1569, 1571, 1572, 1594, 1600, 1602, Civil Code (Pars. 4675, 4677, 4678, 4700, 4706, and 4708, Comp. Laws).
Articles 146 to 150 Code of Commerce (Pars. 7704 to 7708, Comp. Laws).

Sections 51 and 73, Code of Civil Procedure (Pars. 5035, and 5057, Comp. Laws).

See also,

Successors to Sabrino Fernandez & Co., v. *Registrar*, 27 Porto Rico Rep. 425, 427.
P. Gandia & Co. v. *Registrar*, 31 Porto Rico Rep. 74.

Suits are habitually brought for and against such partnerships (*sociedades*) in the insular courts, in the firm name (the "*razon social*" prescribed by Art. 147 of the Code of Commerce; Par. 7706 Comp. Laws).

For examples, see the cases in a single volume (Vol. 31) taken at random of the published Reports of the Supreme Court of Puerto Rico, besides the case above cited, of

P. Gandia & Co. v. *Registrar*, 31 P. R. Rep. 74,

also the following, among others, *in that single volume, viz.;*

Cid. v. *C. Perez Alverez, Ltd.*, 31 P. R. Rep. 197.
N. Santini & Co. v. *Santini*, 31 P. R. Rep. 308.
Alcover & Co. v. *Magraner*, 31 P. R. Rep. 747.
Moral & Co. v. *Bull Insular Line, id.*, 903.
Pasapera v. *Mendez Brothers, id.*, 904.
F. Fresno & Co. v. *Smaine, id.*, 912.
R. Boak & Co. v. *Armstrong & Co., id.*, 915.
Quinones v. *Panzardi & Co., id.*, 917.

B.—The "*Sociedad en Comandita*" is so generally regarded in Puerto Rico as a juridical entity, as a matter of course, that any question as to the character of such an organization appears to have been seldom raised directly. However, the following cases in addition to those above cited indicate its recognized character as a juridical entity:

Estape v. *Rocafort*, Tomo, 2, D. P. R., p. 252.
American Colonial Bank v. *Registrar*, 4 P. R., p. 273.
Delgado v. *Lecaroz & Co.*, 4 P. R., 291.
Brenes v. *Hartman*, 8 P. R., 361 (in the Spanish ver-

sion the words "limited commercial partnership" in this case appear as "*sociedad en comandita*").
Finlay v. *Finlay Brothers et al*, 8 P. R. 371, at p. 388.
Santiago Umpierre & Co. v. *Wener*, 10 P. R. 505, 507 (this involved a "*sociedad mercantil*").
Del Pilar v. *Velez*, 19 P. R. 1061, 1064.
(Suit must be in name of *sociedad;* "it alone could recover"; individual partners may not sue).
Quintana v. *Ramirez*, 22 P. R. 707, 716.
Cintron v. *Colorado*, 22 P. R. 541, 544.
Gandia v. *Registrar*, 31 P. R. 74.

See also,

Enciclopedia Juridica Española, Vol. 24, pp. 712-713; Vol. 28, pp. 870-872.
Manresa on the Spanish Civil Code (Codigo Civil Español), Vol. 1, pp. 217, 218, 227.

Both of these latter authorities are frequently referred to by the Supreme Court of Puerto Rico as authoritative commentaries on Spanish law. The Puerto Rican Civil Code, the Code of Commerce, and the Mortgage Law, are all taken directly from the Spanish law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 115.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,

Petitioner,

vs.

HORACE HAVEMEYER, *et al.* (RUSSELL & Co., Sucrs., S. en C.),

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

RALPH S. ROUNDS,
Attorney for Respondents.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
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vs.

HORACE HAVEMEYER *et al.* (RUSSELL & Co., Sucrs., S. en C.),
Respondents.

BRIEF IN OPPOSITION TO PETITION.

Nature of the Case.

On March 8, 1929 the petitioner, The Public Service Commission of Puerto Rico, made an order (R. p. 29) cancelling that part of a franchise relating to the use of certain waters of Guanica Lake in Puerto Rico for purposes of irrigation which was granted by former Executive Council of Puerto Rico on March 19, 1901 and which, so far as concerns the use of said waters, belongs to the respondents.

The respondents appealed from that order to the District Court of San Juan under Section 78 of the Public Service Act of Puerto Rico (Act No. 70, approved December 6, 1917, Laws of Puerto Rico 1917, Vol. 2, pages 432-456, of which the important parts are printed as an Appen-

dix to the petition of the Commission). That court on June 4, 1930 rendered judgment (R. p. 67) dismissing the appeal and affirming the order.

From the judgment of the District Court the respondents appealed to the Supreme Court of Puerto Rico under Section 90 of the Public Service Act of Puerto Rico (printed at page 43 of the Appendix to the petition). That court on November 9, 1933 affirmed the judgment of the District Court (R. p. 82) with an opinion (R. pp. 70-81).

The respondents further appealed from the judgment of the Supreme Court to the United States Circuit Court of Appeals for the First Circuit under Section 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925 (Chap. 229, 43 Stat. 938). That court on January 10, 1935 reversed the judgment of the Supreme Court and remanded the case for further proceedings not inconsistent with its opinion (R. pp. 89-104).

The Public Service Commission has filed with this Court its petition that a writ of certiorari to the Circuit Court of Appeals for the First Circuit be granted, together with a supporting brief.

By this brief the respondents oppose the granting of that writ.

Opinions Below.

The opinion of the insular District Court of San Juan (R. 49-66) is not officially reported. The opinion of the Supreme Court of Puerto Rico (R. 70-81) is reported in volume 45, *Decisiones de Puerto Rico* (Spanish edition), p. 698. It has not yet appeared in the English edition of the Puerto Rico Reports. The opinion of the Circuit Court of Appeals (R. 89-104) is reported in 74 F. (2nd) 637.

Questions Presented.

The questions presented are: Did the judicial power of the Circuit Court of Appeals for the First Circuit as a constitutional court enable it to determine whether the judgment of the Supreme Court of Puerto Rico should be upheld on the ground that the Commission's order was reasonable, or reversed on the ground that it was unreasonable? And was Russell & Company, Sucrs., S. en C., the limited partnership owning the water franchise, a party to the appeal? (See Petition, pp. 2 and 3).

ARGUMENT.

POINT I.

The Circuit Court of Appeals clearly had jurisdiction to decide the controversy presented. The controversy was that presented and decided in the two lower Courts—whether the order of the Public Service Commission should be upheld as being reasonable and hence valid, or reversed as being unreasonable and hence invalid. Reasonableness was clearly one of the tests or conditions of the validity of such an order, both by express provision of the Public Service Act of Puerto Rico and also by the recognized rule of law regarding amendment of franchises under a reserved power.

In deciding that controversy the Puerto Rican Courts and the Circuit Court of Appeals acted judicially; they did not and could not exercise any executive or legislative powers in the premises.

The language of the Circuit Court of Appeals on this point is clear (R. pp. 101, 102).

"The Public Service Act of Puerto Rico vests no legislative or executive powers in the insular courts under Sec. 85 of the Act. The District Court of San Juan on appeal has no power to change the order of the Commission. If it is not reasonable, or does not conform to the law, or is based on incompetent evidence, it can only reverse, or in its discretion remand, it to the Commission, which alone has the legislative or executive power to change it. * * *.

It is clear, we think, that under the Public Service Act of Puerto Rico, the insular courts on appeal from the Puerto Rico Commission act judicially in determining whether its orders are reasonable, are in conformity with the law, and are based on competent evidence; and the same issues, on appeal from the Supreme Court of Puerto Rico, may be raised in this court ".

The important sections, 83 and 85, of the Public Service Act of Puerto Rico are printed at page 42 of Appendix I to the petition for the writ of certiorari.

"Section 83. *Record as Evidence.*—At the hearing of the appeal the said court" (District Court of San Juan) "shall, upon the record certified to it by the Commission, determine whether or not the order appealed from is reasonable and in conformity with law."

"Section 85. *Decree of Court. How Entered.*—If the court shall upon the record find that the order appealed from is reasonable and in conformity with the law it shall enter a decree dismissing the appeal and affirming the order of the Commission. *If the Court shall upon the record find that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determina-*

tion or order of the Commission or is otherwise not in conformity with law, it may enter a final decree reversing the order of the Commission, or, in its discretion, it may remand the record to the Commission with directions to reconsider the matter and make such order as shall be reasonable and in conformity with the law. * * *" (Italics ours.)

Obviously the District Court acting under this statute upon the record below must decide, and did decide, whether as a matter of law the order was to be upheld as being reasonable, or reversed as being unreasonable. Obviously it could exercise, and did exercise, no administrative or legislative power. It could not modify the order appealed from or direct the Commission what modification to make.

On this question the Supreme Court of Puerto Rico on appeal could do no more than to determine whether the District Court had erred in—judicially—deciding that controversy and in holding that the order must be upheld as being reasonable. This the Supreme Court well understood; in its opinion (R. p. 80) it said:

> "The controversy is limited to a determination of whether such decree is reasonable or not, and whether it is in accord with the law";

and it concluded that

> "The order or decree of the Commission is reasonable and in accord with the law."

Consequently it affirmed the District Court judgment. Obviously in so adjudging that the District Court had not

erred in deciding the controversy, the Supreme Court acted judicially and not in an administrative or legislative way.

Upon appeal from the Supreme Court the Circuit Court of Appeals had to decide upon the record below whether the Supreme Court had erred in deciding—judicially—to uphold the order as reasonable. Obviously in holding, as it did, that the Supreme Court had erred and that its judgment should be reversed, the Circuit Court of Appeals acted judicially. It could not modify the order or direct the Commission how to proceed or what sort of an order to make. It could and did suggest that although its order of cancellation was unreasonable under the circumstances and thus not to be upheld, the Commission might be able to make a reasonable order amending the franchise.

The decisions of this court are perfectly clear that under such a statute as the Public Service Act of Puerto Rico the action of the Appellate Courts is judicial and not administrative or legislative.

In *Pacific Telephone Company* v. *Kuykendall,* 265 U. S. 196, this court had occasion to consider in this aspect the character of an appeal to a Washington state court from an order of the Washington Public Service Commission under a Washington statute strikingly similar to the Puerto Rican statute. This court held that such an appeal was not an administrative remedy and that in deciding such an appeal the Washington court would not "act legislatively".

This decision is decisive of our case. The court says (p. 200):

> "By the statutes of Washington (§10428, Remington's Comp. Stat. 1922), any complainant affected by

> any order of the Commission (now the Department), may within thirty days apply to the Superior Court of the proper county for a writ of review *'for the purpose of having its reasonableness and lawfulness inquired into and determined.'* The Commission certifies the record upon which the court is to enter judgment affirming or setting aside the Commission's order. If reversed for failing to receive proper evidence offered, the case is to be referred back to the Commission to receive the evidence and enter a new order. The court may remand any case reversed by it to the Commission for further action. *It is clear that the function to be performed by the Superior Court under this section is judicial.* It does not fix rates or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks into the reasonableness and lawfulness of the order of the Commission and is to determine whether evidence which should have been received was rejected, and in that case is to send the case back to the Commission for a new order. *The court does not act legislatively.''* (Italics ours.)

In the later case of *Federal Radio Commission* v. *Nelson,* 289 U. S. 266 (May 8, 1933), an appeal from an order by the Radio Commission, this court, against a vigorous challenge of jurisdiction (p. 274) on the same grounds as those pressed in this case, held that as a constitutional court it could consider and decide the appeal.

In the course of his long opinion Mr. Chief Justice HUGHES said (p. 277):

> ''If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of

> the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. *The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body.* We must not 'be misled by a name but look to the substance and intent of the proceeding.' " (Italics ours.)

In that case, as in ours, the validity of an order by a Commission with administrative powers was in question.

In that case, as in ours, the Court could review only questions of law.

In that case, as in ours, there was no power in the appellate court to exercise discretion or dictate the action of the Commission, but only to decide whether the Commission exceeded its limitations and only to affirm or reverse.

In our case the Public Service Act of Puerto Rico, Sections 83 and 85 (above quoted), provide in effect that an order by the Commission must not be unreasonable; if unreasonable it must be reversed or remanded. In the Radio Commission case the limitation of power in the Commission was *arbitrariness* or *capriciousness;* in our case the limitation is *unreasonableness*—and as a constitutional court can pass on one limitation, so it can pass on the other.

Apart from any statute there is good authority for the rule that when under a reserved power an order is made amending a franchise, Federal Courts will determine—judicially—whether the order is unreasonable or arbitrary and, if so, will hold it invalid.

We need only quote from *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin,* 238 U. S. 491, 501, a case regarding

sleeping car rates, where this court held that "the reserved right of altering and amending the charter of a corporation does not confer mere arbitrary power or authorize the taking of the corporation's property without compensation" (headnote). The court said:

> "In the brief of counsel for the State it is argued that the statute can be sustained as a valid exercise of the State's reserved power to alter the charter of the Company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed such a ruling would seem to have been opposed to *State ex rel. Northern Pacific* v. *R. R. Commission,* 140 Wisconsin, 157, and the *Water Power Cases,* 148 Wisconsin, 124, where it was held that the right to amend a charter does not authorize the taking of the Company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example in *Shields* v. *Ohio,* 95 U. S. 324, it was said that 'the power of alteration and amendment is not without limit. The alterations must be reasonable . . . and consistent with the scope and object of the act of incorporation.' . . . Again in *Stearns* v. *Minnesota,* 179 U. S. 223, 259, it was held that the reserved right to amend a corporate charter 'does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by . . . taking of property without due process of law.' *Lake Shore &c. Ry.* v. *Smith,* 173 U. S. 690; *Stanislaus Co.* v. *San Joaquin Co.,* 192 U. S. 201; *Sinking-Fund Cases,* 99 U. S. 720; *Miller* v. *State,* 15 Wall. 498; see also *Delaware, Lackawanna &c.* v. *Board of Public Utilities,* 85 N. J. L. 28, 38, where it was held that, under such a power, the Company could not be required to furnish free transportation to certain designated officials."

It seems clear, then, that the lower courts and the Circuit Court of Appeals were deciding *judicially* whether the order should be upheld as being reasonable or should be reversed as being unreasonable. Not in any sense or to any extent were these courts deciding the question of "its wisdom from an administrative point of view"; it is not true in any sense that the question before the court was "merely a question of the wisdom of the executive authority in exercising administrative powers admittedly within its province."

It is hard to see the relevance of the petitioner's discussion of reasonableness in its Point II (Petitioner's Brief, pp. 26 to 28). The Circuit Court of Appeals having *within its jurisdiction* decided that the Supreme Court had erred in holding that the order was to be upheld as being reasonable, this Court will not review the decision as to reasonableness. The writ of certiorari is here sought on the ground that there is no "controversy" which the Circuit Court of Appeals had jurisdiction to decide—not on the ground that the court erred in deciding that the order should be reversed because arbitrary and unreasonable. In stating (Petition, p. 20) its "Reasons for Granting the Writ" the petitioner makes clear that the writ of certiorari is not sought to review a mistake of the Circuit Court as to reasonableness but only to determine definitively the "'scope of the judicial power of the United States and of the power of a constitutional court of the United States to review the action of the Public Service Commission" etc. The petitioner's statement of "Questions Presented" (Petition, p. 2) is to the same effect.

POINT II.

No question of "local law" is here involved.

This is proved by the Supreme Court opinion (R. p. 81) and the Circuit Court of Appeals opinion (R. p. 103). Each opinion shows that the Court did not consider or decide upon any question of local law but did decide on what each Court considered to be general principles, not peculiar in any way to Puerto Rico.

The construction of Acts of Congress and of the Franchise (which is, after all, a contract *carefully drawn in English*) is certainly not a matter of local law, nor is the determination of the reasonableness of the Commission's order, in view of the facts found or admitted.

Each of the cases of local law cited by counsel for the petitioner at page 29 of his brief concern some clear matter of local law or procedure, such as the Puerto Rican law of waters, very different from the American, or the construction of tax provisions of the Political Code of Puerto Rico, or the Spanish Law of prescription, or the effect of the Puerto Rican mortgage law, or the liability of one signing a note under the Puerto Rican Civil Code, or the Philippine Civil Code governing parental authority.

POINT III.

The appeal to the Circuit Court of Appeals was properly taken by the partnership "Russell & Company, Sucrs. S. en C.", the owner of the water franchise; and the partnership entity was properly before that court.

The petitioner contends that in the appeal from the Supreme Court to the Circuit Court of Appeals "the corporate entity, the Sociedad en Comandita, Russell & Co. Sucrs. S. en C., which alone appears to claim any title to the franchise involved" was absent (Petition, pp. 2 & 3), that the "appeal to the Circuit Court of Appeals really presented nothing but a moot case" (Petition, p. 30), and that the appeal being taken by the partners, the judgment in the Court below would not bind the corporate entity.

This contention is clearly without foundation.

It is impossible to improve upon the statement of the Circuit Court of Appeals overruling the similar contention made before that Court (R. p. 90):

> "It is of no importance whether the individual members of Russell & Company are parties to this appeal.
>
> The order to show cause was issued to 'Russell & Company, S en C, a limited partnership.' That company is here. Throughout the entire proceedings it has been designated as a civil agricultural partnership, or a limited partnership, as it appears it is, Secs. 125, 156 of the Commercial Code, Civil Code (1930) Sec. 1590, and every order and judgment has been against it in that capacity. It is too late now to raise the point. Russell & Company as a Sociedad en Comandita, having been proceeded against and consented to be treated in the proceedings as a civil

agricultural partnership, we think it may be considered bound by whatever judgment may be rendered."

Throughout the proceedings the intention has been clear that the partnership entity should be a party, and the Commission and all three courts have shown that they considered that the partnership entity was a party. This appears at the following pages of the Record: 1 (the title and commencement of the petition for appeal showing Horace Havemeyer, *et al.*, as partners of the civil agricultural partnership Russell & Co., Sucrs., S. en C., appellants), 16 (the order of the Public Service Commission addressed to "Russell & Company, Sucrs., S. en C."), 25 (the special apearance by "Russell & Company, Sucrs., S. en C., a civil agricultural partnership, composed of Horace Havemeyer," etc.), 26 (the answer of "Russell & Company, Sucrs., S. en C., a civil agricultural partnership organized in accordance with the laws of Puerto Rico, composed of Horace Havemeyer, Frank A. Dillingham, Frank M. Welty, Edwin L. Arnold and H. B. Orde as partners"), 29 (verification by the "attorney for Russell & Company, Sucrs., S. en C."), 50 (the District Court opinion stating that "the appellants as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C."), 51 (the District Court opinion stating that the Commission addressed its order to the "respondent Russell & Company, Sucrs., S. en C." and again at the hearing before the Commission appeared "Russell & Co., Sucrs., S. en C. (respondent)"), 53 (the District Court opinion stating the appearance of the appellants "Russell & Co., Sucrs., S. en C.") and 70 (the Supreme Court in its opinion says that "the civil agricultural partnership Russell & Company, Sucrs., S. en C. by its partners, Horace Havemeyer and others" appealed).

Indeed, by the wording of the title to the petition for the writ of certiorari counsel for petitioner himself indicates that he considers that the entity is a party; he names as respondents "Horace Havemeyer, *et al.* (Russell & Co., Sucrs., S. en C.)."

The comment of the Circuit Court in *Richardson* v. *Fajardo Sugar Co.*, 237 Fed. 195, 196, might well be repeated here:

> "Upon an examination of the entire record of the courts below, we are of the opinion that the question now raised as to the effect of the stipulation is an afterthought, and is a question not presented to the District Court or to the Supreme Court of Porto Rico."

After all, though Russell & Company is an entity for the purposes of diversity of citizenship, etc. (*Puerto Rico* v. *Russell & Co., et al.*, 288 U. S. 476) Russell & Company is a partnership and acts not by a President or Board of Directors but by its partners. How else, indeed, could this civil, agricultural partnership have appeared or participated in the proceedings on this appeal other than it has done?

CONCLUSION.

The petition for writ of certiorari should be denied for lack of any plausible reason for its granting.

Ralph S. Rounds,
Attorney for Respondents.

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IN THE

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OCTOBER TERM, 1935.

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Respondents.

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The decisions of this Court are clear that under such a statute as the Public Service Act of Puerto Rico the action of the Appellate Courts is judicial and not administrative or legislative 20

Apart from any statute it has often been held in the Federal courts that an amendment or repeal of a franchise under a reserved power must be reasonable. Federal constitutional courts often take jurisdiction to determine —judicially—whether the amendment or repeal is unreasonable or arbitrary and if so, to hold it invalid as depriving the franchise holder of its property without due process of law 26

The petitioner argues that the Commission's order of partial cancellation was a repeal and not an amendment. There can be no sound distinction between the two for the purposes of this rule, but we submit that cancellation of the water rights was in its nature and effect an amendment of the entire integrated franchise within the meaning of the authorities quoted..... 31

Again, and quite apart from the Puerto Rican Public Service Act, the rule is broad American jurisprudence that governmental powers must be exercised "reasonably"; and that Federal constitutional courts will hold void any unreasonable exercise thereof when constitutional rights are involved..... 32

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of law contrary to Section 2 of the Puerto Rico Organic Act of 1917. It was properly held void by the Circuit Court of Appeals.... 37

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By the Organic Act of 1917, Congress did not confer upon the Public Service Commission created by that Act any power or jurisdiction to exercise the power of amendment, alteration or repeal reserved by the Guanica franchise. Section 38, the only section which could be applicable, confers upon the Commission only "the executive functions relating to Public Service corporations heretofore conferred by law upon the Executive Council"; and the reserved power in the Guanica franchise does not relate to a Public Service corporation nor is it a function "conferred by law upon the Executive Council." 68

Certainly Russell & Company is not, and the Guanica Land Company, the original franchise holder, was not, "a public service corporation," and the power reserved in our franchise was not a power relating to a public service corporation, and the new Public Service Commission was not by Section 38 empowered by Congress to exercise that power 71

Nor was it a function "heretofore conferred by law upon the Executive Council"; for that reason again that power was not conferred by Section 38 upon the new Public Service Commission 76

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But even if Congress never itself conferred on the new Public Service Commission any right to amend, alter or repeal our private franchise, nevertheless, it is said, the Puerto Rican Legislature did by Section 60 of the Public Service Act passed by it in 1917 grant to the new Public Service Commission the right to exercise that reserved power.... 79

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 115.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
Petitioner,

vs.

HORACE HAVEMEYER, *et al.* (RUSSELL & COMPANY, SUCRS., S. EN C.),
Respondents.

BRIEF FOR RESPONDENTS, HORACE HAVEMEYER, *ET AL.*, AS PARTNERS OF THE CIVIL AGRICULTURAL PARTNERSHIP RUSSELL & COMPANY, SUCESORES, SOCIEDAD EN COMANDITA.

Nature of the Case.

On March 8, 1929 the petitioner, The Public Service Commission of Puerto Rico, made an order (R. 27, 28) purporting to cancel that part of a franchise relating to the use of certain waters of Guanica Lake in Puerto Rico for purposes of irrigation which was granted by the former Executive Council of Puerto Rico on March 19, 1901 and which, so far as concerns the use of said waters, belongs to the respondents.

The respondents appealed from that order to the District Court of San Juan under Section 78 of the Public Service Act of Puerto Rico (Act No. 70, approved Decem-

ber 6, 1917, Laws of Puerto Rico 1917, Vol. II, pages 432-456, of which important parts are printed as an Appendix to the petition of the Commission.) That court on June 4, 1930 rendered judgment (R. 61) dismissing the appeal and affirming the order.

From the judgment of the District Court the respondents appealed to the Supreme Court of Puerto Rico under Section 90 of the Public Service Act of Puerto Rico (printed at page 43 of the Appendix to the petition). That court on November 9, 1933 affirmed the judgment of the District Court (R. 75) with an opinion (R. 64-75).

The respondents further appealed from the judgment of the Supreme Court to the United States Circuit Court of Appeals for the First Circuit under Section 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925 (43 Stat. 938). That court on January 10, 1935 reversed the judgment of the Supreme Court and remanded the case for further proceedings not inconsistent with its opinion (R. 80-93).

The Public Service Commission filed with this Court its petition that a writ of certiorari to the Circuit Court of Appeals for the First Circuit be granted, together with a supporting brief. Against the opposition of the respondents, the writ was granted on October 14, 1935.

Opinions Below.

The opinion of the District Court of San Juan (R. 46-61) is not officially reported. The opinion of the Supreme Court of Puerto Rico (R. 64-75) is reported in volume 45, Decisiones de Puerto Rico (Spanish edition), p. 698. It has not yet appeared in the English edition of the Puerto Rico

Reports. The opinion of the Circuit Court of Appeals (R. 80-93) is reported in 74 F. (2nd) 637.

The Questions Presented.

The petitioner's statement of the "questions presented" is as follows (Petition, p. 2):

> "The principal question here involves the scope of the 'judicial power of the United States' under Article III of the Constitution.
>
> Does the judicial power extend to the review by a constitutional court of the United States of the 'reasonableness' of an order of a public service commission repealing a public utility franchise in accordance with a clause in the original franchise accepted by the grantee expressly reserving the power to repeal it, inserted in the franchise pursuant to a requirement of an Act of Congress?
>
> Another question is whether the six individual respondents here,—the appellants in the Circuit Court of Appeals,—are parties in interest entitled to maintain an appeal from the order of the Public Service Commission of Puerto Rico, and particularly to maintain an appeal from the insular Supreme Court to the Circuit Court of Appeals, in the absence of the corporate entity, the *Sociedad en Comandita,* Russell & Co., Sucrs. S. en C., which alone appears to claim any title to the franchise involved."

The Respondents ask that this court also consider the question whether the Public Service Commission had any power or jurisdiction to make the order appealed from. The Respondents have argued in every court that no such power existed, and the recent case of *Langnes* v. *Green,* 282 U. S. 531, 535, seems to permit its consideration here. More-

over, in stating the "reasons for granting the writ," the petitioner seems to admit that the question of "the nature and extent of the powers of the Public Service Commission of Puerto Rico is of very great interest and importance to the people of Puerto Rico and to the Insular Government" (Petition, p. 2).

We show below that the franchise in question was not a "public utility franchise", that the entity of Russell & Company was not a "corporate entity" and that the entity was not absent from the courts below.

Statement of the Case.

Upon the record, as agreed to by the parties (R. 78) only those facts are before the Court which are undisputed or admitted or are found to be facts by the courts below.

Russell & Company, Sucesores, Sociedad en Comandita, is a civil agricultural limited partnership organized under the laws of Puerto Rico and Horace Havemeyer and the other individuals named are all the copartners constituting that partnership. The individuals named appear in this litigation only as partners constituting that partnership (R. 2). The partnership is not and never has been engaged in public service (R. 17) and it is in no sense a public service corporation or a public utility.

The first Organic Act,—the Act of Congress of April 12, 1900 (31 Stat. 77), created, in Sections 18 and 27, the Executive Council as the upper house of the Puerto Rican Legislature, and it provided in Section 32, "that all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the Executive

Council, with the approval of the Governor, and all franchises granted in Porto Rico *shall be reported to Congress, which hereby reserves the power to annul or modify the same*" (Italics ours).

By Section 3 of the Joint Resolution of May 1, 1900 (31 Stat. 715) Congress provided:

> "That all franchises, privileges or concessions granted under section thirty-two of said Act shall provide that the same shall be subject to amendment, alteration or repeal; * * *"

On March 19, 1901, the Executive Council of Puerto Rico granted to the Guanica Land Company, a New Jersey corporation, a private franchise (R. 8 ff.) This was duly approved by the Governor of Puerto Rico and accepted by the grantee.

The Guanica franchise was and is a single franchise; it concerned railroad, dock and use of public waters but it was granted for the single purpose of enabling the Guanica Land Company and its assigns to construct and operate a sugar mill and enterprise, raising canes on their lands, irrigating those lands by the franchise waters, transporting the canes by the franchise railroad to the sugar mill and the sugar to the franchise dock and constructing and operating a franchise dock for the purpose of shipment.

The title is

> "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for Purposes of Irrigation of its Lands, and also for the Construction of a Wharf in the Harbor of Guanica, and also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica."

Section I authorizes but does not require the construction of a dam at the outlet "for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and of regulating the flow of the water from said Lake, through the said Cano or otherwise for the purposes hereinafter set forth." It is not claimed that any dam was ever planned or erected.

Section II authorizes the franchise holders to take "such quantity of water not exceeding 20,000,000 gallons during each day as shall be necessary or sufficient for the proper irrigation of the lands now or hereafter owned or leased" by them. The franchise gives no *exclusive* right to take waters. Other abutting owners may, of course, use their riparian rights or other water franchises may be granted.

Section III authorizes the franchise holders to erect "such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters."

Section IV, by way of limitation on I, provides that the franchise shall not be "held or construed to authorize or permit" the franchise holders "to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall", and further, that the franchise holders shall bear "all damage sustained by abutting owners by reason of unduly raising the level of the waters of said Lake" and that actions for such damages shall lie against the franchise holders in any court of competent jurisdiction. That "customary level" has never been fixed or determined either by the Government or by the franchise holders (Supreme Court opinion, R. 74).

Section XXI makes clear that the franchise gives no right to use or dispose of the franchise waters except for irrigation of lands owned by the franchise holders for raising their own crops.

Sections V, VI and VII of the franchise authorize the franchise holders to construct, maintain and operate a line of standard gauge railway with proper sidings, switches and other appurtenances upon lands owned or leased by them, lying within six meters of the bank of the Cano Negro or within twenty meters of the shore of the Lake of Guanica or of the Harbor or Bay of Guanica. It is expressly provided that the franchise for the construction, maintenance and operation of the railroad should not give them the right to transport for hire (R. 10).

Sections VIII, IX and X authorize the franchise holders to erect, construct, maintain and operate a dock or wharf in the harbor of Guanica under proper conditions, "of sufficient size and length to allow of its use by steamers and vessels for the purpose of receiving and discharging the goods, chattels and effects of the said Company and its successors and assigns, and for the debarkation and embarkation of its or their officers, agents and employees" (R. 11), but without the right to permit the use of the wharf or dock by steamers or vessels of other persons, firms or corporations or to permit the franchise holders to carry in their own vessels or otherwise goods, chattels or effects belonging to others.

Section XI provides for all kinds of necessary works; Sections XIII and XIV give the right of condemnation for any necessary use; XV provides for acceptance of the franchise as a whole, and Section XVI for a single payment

for all; Sections XVIII, XIX and XX apply to all three parts of the franchise together.

Section XVIII contains the following provision required by the Joint Resolution:

> "In accordance with Section 3 of Public Resolution No. 23, approved May 1, 1900, it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal."

The last Section of the franchise, XXII (R. 14), contains a reservation by the Executive Council of the right at any time to declare the grantee, its successors and assigns, a common carrier with respect to the railroad and wharf and to extend the use of the railroad and wharf to the general public upon such terms and conditions as to rates and tariffs as the Executive Council may from time to time establish.

The water, railroad and dock provisions of the Guanica franchise are closely interlocked and interdependent, and all rights are confined to the group, "said Company and its successors and assigns."

> Under Section I the amount of water to be taken is limited to what is sufficient for the irrigation of the lands owned or leased "by the said Company, or by its successors or assigns, or any of them."
>
> Under Section IV all the group must pay damages to abutting owners for unduly raising or lowering the water level.
>
> Under Section VI, the railroad must be used only for the transportation of cattle, crops and other

goods and effects "owned by the said Company or its successors or assigns" or their agents and employees and it may not transport the crops, etc. "of any other person, firm or corporation for hire."

Under Sections VII and X, the Commissioner of the Interior, in certain cases of road crossings, etc., may incur expenses and charge the cost "against said Company, its successors and assigns as a first lien upon all of its property and assets."

Under Section IX the wharf must be used only for the "goods, chattels and effects of said Company and its successors and assigns" and for its and their officers, agents and employees, and not for other purposes.

Section XVI provides that the Guanica Land Company and its assigns shall pay to the Treasurer "as consideration herefor the sum of three hundred dollars annually" and on default the Commissioner of the Interior may "stop the flow of water from said Lake" or take other steps to enforce the payment—indicating that the operations of the entire group depend upon the flow of water and they all together are interested in making the single annual payment.

Section XXI limits the benefit of the water rights to the group; it provides that nothing in the grant shall give "said Company or its successors, or to the assigns in whole or in part of any of the rights and privileges herein granted, the right, directly or indirectly, with or without compensation in money or otherwise to use, hire, lease, sell or otherwise dispose

of the waters of said lake or any part thereof for the purpose of irrigating any lands *other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold.*"

The Guanica franchise was obviously intended to be, and has, as a matter of fact, been, the basis of a large investment by the franchise holders in lands, railroad, sugar mill and dock, constituting an integrated enterprise of great value to the franchise holders,—and to Puerto Rico.

The interest of Russell & Company in the water rights is stated by the Circuit Court of Appeals as follows: "At some time prior to 1917, the Guanica Land Company assigned the entire franchise to the Guanica Central which afterward assigned it to the Ensenada Estates, Inc., which assigned to Russell & Company that part of the franchise authorizing the taking of 20,000,000 gallons of water daily from Guanica Lake, that is, 'to be more specific, the rights contained under paragraphs I to IV inclusive of said franchise' " (Opinion, R. 83).

The assignment to Russell & Company was made under Section XVII of the franchise, which permits assignment (R. 13), which requires no approval by the Public Service Commission and which does not indicate that the assignment of particular rights under the franchise will split the franchise or transform it into two separate franchises. Russell & Company, after the assignment, was and con-

tinues to be a member of the group designated throughout the franchise as "The Guanica Land Company, its successors and assigns." Of this group, the South Porto Rico Sugar Company is an interested member "apparently having acquired rights under the franchise to the railroad and wharf" (Opinion of the Circuit Court of Appeals, R. 83).

Near the Lake of Guanica is a district of an average level somewhat higher than the bottom of the Lake; this has often been flooded in the past, for instance, in 1914 and 1922 (R. 16) and obviously by reason of frequent floods is commonly called "El Anegado", the flooded region. "Since the month of July, 1926, a great flood began suddenly which covered all of the area known as 'El Anegado' (overflowed region), * * * the water having been kept approximately with that same level since that date, that is, since the middle of the year 1926, during all of the year 1927 till late in the year 1928" (Report of the President of the Public Service Commission forming a part of the order of cancellation, Ex. G, R. 31; also Supreme Court opinion, R. 67).

"There is no evidence of any positive act on the part of the appellant (respondent here) to close Negro pond", the outlet to Guanica Lake (Supreme Court opinion, R. 74). The floods were caused by heavy rains.

On February 27, 1928, the neighboring Municipality of Lajas complained of the floods by resolution (R. 18 ff.); this was the only complaint made. Thereafter the Public Service Commission issued an order to show cause (R. 15 ff.) and other proceedings were taken, as shown by the record (R. 21 to 45). The Respondents made a special appearance and motion to dismiss the case before the Pub-

lic Service Commission (R. 23) and thereafter made answer (R. 24).

Russell & Company and the South Porto Rico Sugar Company took steps to obtain an injunction from the Federal District Court of Puerto Rico against the proposed action of the Commission; this was refused and on appeal the Circuit Court of Appeals, First Circuit, affirmed the decree (28 Fed. (2nd) 820) mainly on the ground that the application was premature, as shown by its opinion which is copied in full in the Supreme Court opinion (R. 68 ff.).

On March 8, 1929, against the opposition of the respondents, the Public Service Commission made an order (R. 27, 28) by which it "orders the cancellation—as it hereby cancels—of that part of the franchise number 5 which refers to the use of certain waters of Guanica Lake for purposes of irrigation." The reasons for this order are given in the Report of the President (R. 28 to 35) which was made a part of the order.

The Report suggests (R. 35) that "if the persons who enjoy at present the right granted by this franchise are interested in using these waters of the lake for purposes of irrigation, there will be no objection to their filing a new petition" with specifications about the water level, and that *"then, after this has been done, the Commission will decide what it may deem convenient."* (Italics ours.) The order (R. 28), after making the cancellation, provided that before it should become effective on June 30, 1929, the "parties in interest are at liberty to file any further petition which they may deem convenient for the use of the waters of Guanica Lake * * *". There was no promise that any new franchise would be granted on any conditions whatever.

From this order of cancellation the respondents took appeal under Section 78 of the Public Service Act of Puerto Rico (Act No. 70 of the Porto Rican Laws of 1917, Vol. II, p. 526) to the District Court of San Juan by petition for appeal (R. 1 ff.). To this the Public Service Commission made answer (R. 36) and on December 17, 1928, the Public Service Commission made an interlocutory order (R. 43).

The District Court of San Juan, by judgment entered on June 4, 1930 (R. 61 ff.), dismissed the appeal and affirmed the order for the reasons stated in its opinion (R. 46 ff.).

The respondents further appealed under Section 90 of the Public Service Act of Puerto Rico to the Supreme Court of Puerto Rico from the District Court judgment; and by judgment of the Supreme Court entered on November 9, 1933 (R. 75) the District Court judgment was affirmed for the reasons embodied in the opinion (R. 64 ff.) which was in effect made a part of the judgment.

The respondents appealed from that judgment to the Circuit Court of Appeals for the First Circuit under the fourth paragraph of Section 128 of the Judicial Code; and by judgment dated January 10, 1935 (R. 93) the Circuit Court reversed the judgment of the Supreme Court and remanded the case for further proceedings not inconsistent with its opinion (R. 80-93).

On April 4, 1935, the Petitioner's time to apply for writ of certiorari was extended (R. 94); and by order filed October 14, 1935, this court granted the petition for a writ of certiorari to the Circuit Court of Appeals (R. 94).

ARGUMENT.

POINT I.

The Circuit Court of Appeals clearly had jurisdiction to decide the controversy presented. The controversy was that presented and decided, judicially, in the two lower courts—whether the order of the Public Service Commission should be affirmed as being "reasonable" and hence valid, or reversed as being "unreasonable" and hence invalid.

"Reasonableness" is a necessary condition of the validity of such an order (1) by the express provision of the Public Service Act of Puerto Rico, and also (2) by the cases holding that amendment or repeal of franchises under a reserved power, must be reasonable, and also (3) by the rule that property taken unreasonably by statute or any governmental action is taken without due process of law.

In deciding that controversy the Puerto Rican Courts and the Circuit Court of Appeals acted judicially; they did not and could not exercise any executive or legislative powers in the premises.

The language of the Circuit Court of Appeals on this point is clearly correct (R. 91, 92).

> "The Public Service Act of Puerto Rico vests no legislative or executive powers in the insular courts under Sec. 85 of the Act. The District Court of San Juan on appeal has no power to change the order of the Commission. If it is not reasonable, or does not conform to the law, or is based on incompetent evidence, it can only reverse, or in its discretion remand,

it to the Commission, which alone has the legislative or executive power to change it. * * *

It is clear, we think, that under the Public Service Act of Puerto Rico, the insular courts on appeal from the Puerto Rican Commission act judicially in determining whether its orders are reasonable, are in conformity with the law, and are based on competent evidence; and the same issues, on appeal from the Supreme Court of Puerto Rico, may be raised in this court."

The Public Service Act, providing for appeal from orders by the Public Service Commission to the District Court of San Juan and for the procedure on such appeals (Act No. 70, Laws of Puerto Rico, 1917, Vol. II, pp. 432-546, important sections of which are printed in Appendix I of the petition for writ of certiorari) shows that the District Court of Puerto Rico must on such appeals act judicially; it has no other power.

On such an appeal the Public Service Commission is brought in as a party defendant and must make answer (Secs. 79 and 82). This negatives the idea that the District Court is an administrative court to correct decisions of the commission.

All such appeals are by petition embodying assignment of errors in the Commission's order, and "upon the filing of an answer by the commission the case shall be considered at issue and a hearing shall be held before said court * * * without further pleadings" (Secs. 78 and 82).

The commission must, upon notification of the appeal, "certify under its official seal to the proper court * * * the record of the said proceedings." Said "record shall include the testimony taken therein, the findings of fact, if any, of

the commission based upon such testimony, a copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission" (Sec. 79).

"At the hearing of the appeal the said court shall, *upon the record* certified to it by the commission, determine *whether or not the order appealed from is reasonable and in conformity with law*" (Sec. 83; italics ours). No new testimony can be taken by the District Court (Sec. 86) and the fact that the decision must be made "upon the record" certified up shows that the District Court can determine only questions of law and can act only judicially.

The character of the judgment on appeal is determined by the important Section 85:

> "*Decree of Court, How Entered.* If the court shall *upon the record* find that the order appealed from is *reasonable* and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the commission. If the court shall, *upon the record,* find that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law, it may enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, *with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law.* In case the said court shall reverse an order of the commission dismissing a complaint, after an investigation and hearing thereon before the commission, it *shall remand* the record and proceedings to the commission, with directions to reinstate the complaint, proceed to another hearing and investigation, and

make such order as shall be reasonable and in conformity with law. In making any final decree on any appeal the court shall have full power to dispose of costs." (Italics ours.)

This Section 85 proves that the District Court on appeal can act only upon the record below, that it can on such an appeal decide no question except whether the order appealed from is (1) unreasonable or (2) based upon incompetent evidence or (3) otherwise not in conformity with law—all of which questions are questions of law. The only judgments possible to the District Court are affirmance or reversal of the Commission's order, or a remand to the Commission "with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law", or in case of the reversal of an order by the Commission dismissing a complaint, a remand of the record to the Commission "with directions to reinstate the complaint, proceed to another hearing and investigation, and make such order as shall be reasonable and in conformity with law". The District Court on appeal has no power or jurisdiction to modify the Commission's order or to direct what order the Commission shall make.

All this is wholly inconsistent with the idea that the District Court is acting as a supervisory body or as an administrative court or that it is exercising any function other than a purely judicial one. "No evidence shall be received at the hearing on any appeal", but if it be shown that additional material evidence has been discovered, the District Court may remand the record to the Commission with directions to take and consider the evidence and "enter and file such order as shall in the opinion of the commission be reasonable and in conformity with law" (Sec. 86).

The District Court cannot decide upon the facts, make any new or different order or exercise any discretion except to send the matter back for reconsideration by the Commission.

In all appeals from the Commission "process shall be served and the practice and rules of evidence shall be the same as in civil actions, except as otherwise * * * provided" in the Public Service Act (Sec. 87). In other words, the District Court sits as a court and not as an administrative body.

"Any party to the record aggrieved by the final judgment, order or decree of the aforesaid court may appeal therefrom to the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and form as is provided in other cases of appeal to the Supreme Court" (Sec. 90).

Reference to Chapter II of Title XII of the Code of Civil Procedure of Puerto Rico, providing for appeals to the Supreme Court from the District Court (being Sections 295 to 306 of the Code and found at pages 139 to 145 of the edition of the Code of Civil Procedure, "Revised and published, under the provisions of Joint Resolution No. 18 of 1930, by the Legislative Joint Commission created by Act No. 50 of 1928"), shows beyond question that the Supreme Court is a true court of appeal acting judicially, that it makes its decision upon the record certified from the lower court, that it hears no evidence and decides no question of fact—and, in short, that it can and does act only judicially.

Obviously the *District Court* acting under this statute upon the record below was required to decide, and did decide, whether as a matter of law the order was to be

upheld as being reasonable or reversed as being unreasonable. Obviously it could exercise, and did exercise, no administrative or legislative power. *It could not modify the order appealed from or direct the Commission what modification to make.*

Again, the *Supreme Court of Puerto Rico* on appeal could, regarding the question of reasonableness, do no more than to determine—judicially—on the record below whether the District Court had erred in—judicially—deciding the controversy and in holding that the order must be upheld as being reasonable. This the Supreme Court well understood; in its opinion (R. 73) it said:

> "The controversy is limited to a determination of whether such decree is reasonable or not and whether it is in accord with the law";

and it concluded that (R. 75):

> "The order or decree of the Commission is reasonable and in accord with the law."

Consequently it affirmed the District Court judgment. Obviously in so adjudging that the District Court had not erred in deciding the controversy, the Supreme Court acted judicially and not in an administrative or legislative way.

Upon appeal from the Supreme Court the *Circuit Court of Appeals* had to decide—judicially—on the record below whether the Supreme Court had erred in deciding—judicially—to affirm the decision of the District Court that the order was to be upheld as reasonable. Obviously in holding, as it did, that the Supreme Court had erred and that its judgment should be reversed, the Circuit Court of Appeals acted judicially. *It could not modify the order or*

direct the Commission how to proceed or what sort of an order to make. It could and did suggest that although the order of cancellation was unreasonable and thus not to be upheld, the Commission might nevertheless be able to make a reasonable order amending the franchise. Its *decision* was to reverse the judgment and strike down the order as invalid because unreasonable.

The decisions of this Court are clear that under such a statute as the Public Service Act of Puerto Rico the action of the Appellate Courts is judicial and not administrative or legislative.

In *Pacific Telephone Company* v. *Kuykendall*, 265 U. S. 196, this court considered in this aspect the character of an appeal to a Washington state court from an order of the Washington Public Service Commission (or Department of Public Works) under a statute strikingly similar to the Puerto Rican statute. This court held that such an appeal was not an administrative remedy and that in deciding such an appeal the Washington court would not "act legislatively". The court says (p. 200):

> "By the statutes of Washington (§10428, Remington's Comp. Stat. 1922), any complainant affected by any order of the Commission (now the Department) may within thirty days apply to the Superior Court of the proper county for a writ of review *'for the purpose of having its reasonableness and lawfulness inquired into and determined.'* The Commission certifies the record upon which the court is to enter judgment affirming or setting aside the Commission's order. If reversed for failing to receive proper evidence offered, the case is to be referred back to the Commission to receive the evidence and enter a new order. The court may remand

> any case reversed by it to the Commission for further action. *It is clear that the function to be performed by the Superior Court under this section is judicial.* It does not fix rates or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks into the reasonableness and lawfulness of the order of the Commission and is to determine whether evidence which should have been received was rejected, and in that case is to send the case back to the Commission for a new order. *The court does not act legislatively.*" (Italics ours.)

This decision is decisive of our case; it covers the whole ground.

The legislative situation under consideration was almost exactly like ours. In prescribing the character of the appeal from the order of the Washington Commission or Department, the powers and procedure of the Superior Court upon such appeal, and the character of the decision which that court could make and the judgment which it could enter, the Washington statute is similar in every important particular to the Puerto Rican and the criterion of "reasonableness", which so troubles our adversary, is common to both statutes.

When this Court held that the Superior Court in determining the reasonableness and lawfulness of the order appealed from "does not act legislatively" it decided that in entertaining and deciding our appeal from the order of the Puerto Rican Public Service Commission, the District Court of San Juan—and later the Supreme Court and later the Circuit Court of Appeals—did not act legislatively or administratively, but judicially.

The decision is also interesting because in contrast to the *judicial* procedure stated in the above quotation it de-

scribes a different procedure which would be considered *administrative.* For another provision of the Washington statute provided for an appeal to the Superior Court from a valuation order of the Commission or Department; upon such an appeal the statute provided that the Superior Court could inquire into and determine the correctness, reasonableness and lawfulness of findings regarding valuation and *could make new findings and a new valuation.* Regarding such an appeal, with power in the Supreme Court to make new and conclusive findings, this Court says (p. 202):

> "It is clear that the function of the courts in fixing the valuation of the property of the public utility is not confined to a judicial review of the work of the Commission. The courts are made part of the valuation tribunal, pass on the weight of the evidence, and can set aside a valuation and make a new one. *Keller* v. *Potomac Co.,* 261 U. S. 428."

This Court thus made clear the distinction between an *administrative* appeal under the valuation sections and a *judicial* appeal under the reasonable rate section described in the first quotation above.

The same distinction is neatly shown by the opinion of Mr. Justice Roberts in *Porter* v. *Investors Syndicate,* 286 U. S. 461, 468, where the "solely judicial" function of a State court, "to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights" is distinguished from the legislative action of a court which is bound "to examine the evidence presented and either to set aside or to modify the commissioner's order, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final".

In the later case of *Federal Radio Commission* v. *Nelson*, 289 U. S. 266 (May 8, 1933), certiorari to review a judgment of the District of Columbia Court of Appeals, reversing an order by the Radio Commission, this court, against a vigorous challenge of jurisdiction (p. 274) on the same grounds as those pressed in this case, held that as a constitutional court it could consider and decide the appeal. Under the amended statute for appeals from the Radio Commission, the limitation of power in the Commission (the statutory ground for reversal) was *arbitrariness* or *capriciousness;* under the Puerto Rican statute the limitation is *unreasonableness.* As a constitutional court can pass upon one limitation, so it can pass upon the other.

The parallel to our case is so close, the analysis and discussion of law and theory in the exhaustive opinion of Mr. Chief Justice Hughes are so clearly applicable to our case and the conclusions stated are so clearly determinative of our case that we have printed as an Appendix to this brief all that part of the opinion which concerns the jurisdictional questions here involved.

The *Nelson* case is particularly interesting because (as shown by the extract printed in the Appendix) in the prior case of *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, this Court had held that an appeal taken to the District of Columbia Court of Appeals from an order of the Federal Radio Commission under an *earlier* statute was an administrative appeal and the action of the lower court could not be reviewed by this Court as a constitutional court. After that decision, with a view to avoiding the objections thereby raised, the statute providing for such appeals from the Radio Commission was amended so as to eliminate the objections made in the decision of the *General*

Electric case; and in the later *Nelson* case this Court held that an appeal taken under the *amended* statute was judicial and not administrative and that it could be entertained by a Federal constitutional court. The Puerto Rican statute under discussion has none of the objections upheld by the *General Electric* case; it is, on the contrary, in substance similar to the *amended* statute under which the decision in the *Nelson* case held that the appeal was judicial and not administrative.

Clearly, then, an appeal on the record below with power to decide only questions of law and only to reverse or affirm is a judicial appeal and not administrative or legislative. It can make no difference whether the order appealed from was in exercise of a power granted to the Commission by statute or of a power reserved in a franchise grant or ordinance. Our adversary likes to call the reserved power "contractual"; but under a statute providing in effect that *all* orders of the Commission must be reasonable or else be reversed as invalid, there can be no difference or distinction between an order based on the exercise of a "contractual" power (whatever that may mean) or an order based upon a statutory power. Such a distinction is doubtless attractive to our adversary as offering a chance of escape from the logic of the above mentioned cases, but, we submit, it is "a distinction without a difference."

It is interesting that our adversary in his Supplemental Brief for appellees in the Circuit Court of Appeals (here the petitioners) says

> "The franchise is in the nature of a statute. It is a legislative act, by the local body clothed with authority to grant it."

We have shown that the Supreme Court of Puerto Rico in deciding that the order was reasonable and was to be upheld, and not reversed, made a wrong—but judicial—decision of the controversy before it regarding "reasonableness". The order was (as the Circuit Court of Appeals properly held) unreasonable and the Supreme Court judgment upholding it was wrong, and to be reversed, on any one of three grounds:

1. Section 85 of the Puerto Rican Public Service Act directed that unreasonable orders of the Commission should be reversed;

2. The courts have held that amendment or repeal of a franchise under a reserved power must be reasonable and if unreasonable, must, where (as here) the franchise holder is deprived of his property, be held void as being a deprivation of property without due process of law;

3. The general law is that governmental action and orders must be reasonable, and where (as here) the complainant is thereby deprived of property, such unreasonable action or orders are held void by the courts as a deprivation of property without due process of law.

Our discussion above is confined to the first ground; the second and third we shall now discuss. Discussion of all three grounds is certainly proper. The Puerto Rican courts were bound to consider the case in all three aspects and when the Supreme Court gave judgment upholding what the Circuit Court of Appeals has held to be an unreasonable order, it was the right and duty of the latter court, as a constitutional court, to consider whether or not the order was reasonable and when found unreasonable, to

reverse the Supreme Court judgment. The appeal to the Circuit Court of Appeals was taken under Section 128 of the Judicial Code, which provides that

> "Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions * * * in the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved * * *."

This appeal laid the Supreme Court judgment wholly open for review and for reversal on any one or all three of the grounds named. The point that the order takes property without due process of law has been stressed from the beginning, as we show at page 39 below.

Apart from any statute it has often been held in the Federal courts that an amendment or repeal of a franchise under a reserved power must be reasonable. Federal constitutional courts often take jurisdiction to determine—judicially—whether the amendment or repeal is unreasonable or arbitrary and if so, to hold it invalid as depriving the franchise holder of its property without due process of law.

The following cases lay down the rule above stated and show that the Circuit Court of Appeals as a constitutional court properly took jurisdiction to protect the franchise holder from deprivation of property without due process of law.

Chicago, M. & St. P. R. R. v. *Wisconsin*, 238 U. S. 491, 501, a case regarding sleeping cars, where this court held that "the reserved right of altering and amending the charter of a corporation does not confer mere *arbitrary*

power or authorize the taking of the corporation's property without compensation" (Headnote; italics ours) and decided that a statute of Wisconsin purporting to regulate pullman cars was unconstitutional because it was arbitrary and took property without compensation, and that it could not be supported as an exercise of reserved power to amend a charter. The court said:

> "In the brief of counsel for the State it is argued that the statute can be sustained as a valid exercise of the State's reserved power to alter the charter of the Company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed such a ruling would seem to have been opposed to *State ex rel. Northern Pacific* v. *R. R. Commission*, 140 Wisconsin, 157, and the *Water Power Cases*, 148 Wisconsin, 124, where it was held that the right to amend a charter does not authorize the taking of the Company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court."

Stearns v. *Minnesota*, 179 U. S. 223, 259, where it was held that a statute altering a prior contract relating to taxation of the railroads was void because impairing the obligation of the contract, even though there was a reserved power to amend or repeal. Mr. Justice WHITE in his concurring opinion stated the rule:

> "* * * it has also been equally determined that *the reserved right to repeal, alter or amend does not confer mere arbitrary power*, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law." (Italics ours.)

In *Shields* v. *Ohio,* 95 U. S. 319, 324, this Court undertook to decide whether or not a statute of the State of Ohio fixing rates upon a certain railroad was valid where the charter provided that the railroad might itself fix such rates as it deemed reasonable. The court held that under the reserved power to amend such charter this was a reasonable amendment and valid, saying:

> "The power of alteration and amendment is not without limit. *The alterations must be reasonable;* they must be made in good faith, and be consistent with the scope and object of the act of incorporation. *Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.* Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases." (Italics ours.)

Sinking Fund Cases, 99 U. S. 700, 720. The court in this case considered and upheld an amendment of the charter of a railroad, made under a reserved power to "alter, amend, or repeal," saying:

> "• • • Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made."

Looker v. *Maynard,* 179 U. S. 46, 52. This was a *quo warranto* proceeding in the courts of Michigan brought to

the United States Supreme Court on writ of error. The Supreme Court upheld, under the reserved power, an amendment allowing cumulative voting for directors where such voting was not permitted by the original charter. With respect to the reserved power to alter, amend or repeal, the court said:

> "*The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted,* is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, *which will not defeat or substantially impair the object of the grant or any right vested under the grant,* and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs." (Italics ours.)

Stanislaus County v. *San Joaquin C. & I. Co.*, 192 U. S. 201, 213, cited many United States Supreme Court cases. This was a case of the right of a canal and irrigation company to fix rates for water supply, alleged to be a contract because contained in the charter. The court upheld, after full consideration, the action of the County authorities in fixing rates, one of the grounds being that under the reserved power the charter could be amended so as to fix "reasonable" rates, saying in respect to such power:

> "* * * there is a limitation, even to the power of amendment when reserved in the constitution or a statute of a State. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is

> not without limit; that the alterations must be *reasonably made, in good faith* and consistent with the scope and object of the act of incorporation, and that *sheer oppression and wrong could not be inflicted under the guise of amendment or alteration;* that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases is surrounded by the same sanction and are as inviolable as in other cases." (Italics ours.)

Fair Haven R. R. Co. v. *New Haven,* 203 U. S. 379, 388, where the court after full consideration upheld an assessment for paving between railroad tracks, finding it a proper exercise of the reserved power to amend the charter, saying:

> "The limitation upon the power of amendment of charters of corporations has been defined by this court several times. It is said in one case that such power may be exercised to make any alteration or amendment in a charter granted that will not defeat or substantially impair the object of the grant or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter. *Holyoke* v. *Lyman,* 15 Wall. 500, 522."

Owensboro v. *Cumberland Tel. Co.,* 230 U. S. 58, 74, where this Court held void an ordinance purporting to repeal an ordinance granting a telephone franchise although the franchise-ordinance provided that it might be "altered or amended as the necessities of the city may demand" and the city charter gave it power "to make, publish and repeal ordinances."

The petitioner argues that the Commission's order of partial cancellation was a repeal and not an amendment. There can be no sound distinction between the two for the purposes of this rule, but we submit that cancellation of the water rights was in nature and effect an amendment of the entire integrated franchise within the meaning of the authorities quoted.

We have shown above that the franchise, although providing for water rights and railroad and dock, was nevertheless closely integrated into a single franchise which could only be held and enjoyed by a limited group, "the Guanica Land Company and its successors and assigns". It was obviously granted for the single purpose of enabling the "Guanica Land Company, its successors and assigns" to construct and operate an important sugar enterprise, raising sugar cane on the land, irrigating the lands by water, transporting canes and supplies and the sugar by railroad and constructing and operating a franchise dock for shipment. Any cancellation or repeal of a part of such an integrated franchise is necessarily a modification of the franchise, especially if the basic right to take irrigation water is cancelled. Thus the order cancelling the water rights (four sections out of a franchise containing twenty-two, one of three parts of this closely integrated franchise) is an "amendment" within the rule stated by the authorities above cited—that the amendment of a franchise must be reasonable and consistent with its character and purpose.

Moreover, as we have shown at pages 8 to 11 above, all parts of the franchise are so closely interwoven and interdependent that the water rights cannot be cancelled without deranging the other parts of the franchise and materially altering the whole. One leg of a tripod cannot

be destroyed or even moved without damaging the whole machine.

It is not really material to consider whether the cancellation order was amendment or repeal; there can be no sound distinction for this purpose between the two, and in either case the authorities cited above show that the action must be reasonable.

Again, and quite apart from the Puerto Rican Public Service Act, the rule is broad in American jurisprudence that governmental powers must be exercised "reasonably"; and that Federal constitutional courts will hold void any unreasonable exercise thereof when constitutional rights are involved.

This jurisdiction Federal constitutional courts continually take. The cases where the rule is laid down and Federal courts have exercised jurisdiction to protect constitutional rights are so numerous that it is hard to select, but we may mention a few typical cases.

The *general principle* that all governmental power, under our system, must be reasonably exercised, and that government may not be arbitrary and capricious has been often emphatically asserted by this court, as in the two leading cases of *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369, 370, and *Hurtado* v. *California,* 110 U. S. 516, 535, 536.

The police power, the power to make regulations of all kinds to promote the public welfare, and one of the broadest and most important powers of government, must be exercised reasonably.

Nebbia v. *New York,* 291 U. S. 502. This case involved, and this court decided upon and upheld the validity of a

State statute regulating the milk business, fixing prices, etc. In the course of its discussion of the police power, the Court, by Mr. Chief Justice HUGHES, said, at page 525:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. *And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious,* and that the means selected shall have a real and substantial relation to the object sought to be attained." (Italics ours.)

See also *Chicago etc. Ry.* v. *Drainage Comm.*, 200 U. S. 561, 592; *Nashville etc. R. R.* v. *Walters*, 294 U. S. 405, 414 (March 4, 1935); *Panhandle Co.* v. *Highway Comm.*, 294 U. S. 613, 622 (April 1, 1935); *Atlantic Coast Line* v. *Corporation Comm.*, 206 U. S. 1, 20.

Powers which have been delegated to or conferred on commissions, etc.; must be reasonably exercised even though this requirement is not included in the act creating the Commission.

Interstate Com. Comm. v. *Louisville, etc. R. R.*, 227 U. S. 88. In this case an order of the Interstate Commerce Commission fixing rates was upheld. In reaching its decision this Court examined the record to find whether there was evidence to sustain the order and whether under the facts shown the order was reasonable. It was argued that the statutes did not require that an order of the Interstate

Commerce Commission should be based upon substantial supporting evidence. The Court said, at page 91:

> "And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and *capriciously make findings by administrative fiat.* Such authority, however beneficently exercised in one case, could be injuriously exerted in another; *is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.*" (Referring to the due process clause; italics ours.)

United States v. *Chicago, etc. R. R.*, 282 U. S. 311, 324. Here, in declaring void an order of the Interstate Commerce Commission, the Court said that a power conferred on the Interstate Commerce Commission "is not unlimited and may not be exercised arbitrarily."

The requirements of reasonableness and the rule that governmental action may not be arbitrary or capricious is often applied in the cases dealing with the *power to fix rates* of common carriers and other public service corporations.

Reagan v. *Farmers' L. & T. Co.*, 154 U. S. 362, 399, where the court went extensively into the evidence and on the evidence held void certain rates fixed by the Texas Railroad Commission, saying:

> "This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a govern-

> ment, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. *It was, therefore, within the competency of the Circuit Court of the United States* for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, *to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission.*" (Italics ours.)

See also *Chicago, etc., Ry.* v. *Wellman,* 143 U. S. 339, 344; *St. Louis, etc., Ry.* v. *Gill,* 156 U. S. 649, 657.

The due process clause in the Fifth and Fourteenth Amendments, repeated in Section 2 of the Puerto Rican Organic Act (39 Stat. 951), requires that all exercises of governmental power must be reasonable, bear a real and substantial relation to the public welfare and be in accord with fundamental principles of liberty and justice.

Chicago, etc., Ry. v. *United States,* 284 U. S. 80, 97. In this case the Supreme Court passed upon and held invalid certain car hire regulations made by the Interstate Commerce Commission, and said:

> "The use of railroad property is subject to public regulation, but *a regulation which is so arbitrary and unreasonable* as to become an infringement upon the right of ownership *constitutes a violation of the due process of law clause* of the Fifth Amendment. *Atlantic Coast Line* v. *No. Carolina Corporation Comm.,* 206 U. S. 1, 20. And certainly a regulation permitting the free use of property in the

face of an express finding that the owner is entitled to compensation for such use cannot be regarded otherwise than as *arbitrary and unreasonable.*" (Italics ours.)

Atchison, etc. Ry. v. *Railroad Comm.*, 283 U. S. 380. The California Railroad Commission had issued an order requiring certain railroads to construct a Union Station in the City of Los Angeles. The Court considered the question of the reasonableness of this order and upheld it, saying per Mr. Chief Justice HUGHES, at page 395:

> "* * * But the power to regulate is not unlimited. '*It may not unnecessarily or arbitrarily trammel or interfere* with the operation and conduct of railroad properties and business.' *Norfolk & Western Ry. Co.* v. *Public Service Comm.* 265 U. S. 70, 74; *Mississippi Railroad Comm.* v. *Mobile & Ohio R. Co. supra. The question in each case is whether,* in the light of the facts disclosed, *the regulation is essentially an unreasonable one.*" (Italics ours.)

Reinman v. *Little Rock*, 237 U. S. 171. The City of Little Rock had passed an ordinance forbidding the conducting of the business of a livery stable in certain portions of the City. The Court said, in respect to the ordinance itself, that it was enacted "under authority delegated by the legislature" and was "a state law within the meaning of the Federal Constitution * * * and within the meaning of the Judicial Code, Section 237, which confers jurisdiction upon this court." In considering and upholding the validity of this ordinance, the Court said, at page 177:

> "While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the

> law-making power; and so long as the regulation in question is not shown to be clearly *unreasonable and arbitrary,* and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been *arbitrarily* selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment." (Italics ours.)

Mooney v. *Holohan,* 294 U. S. 103, 112. The Court considered whether certain criminal procedure in a State court was due process of law, and, in regard to the requirement of due process, said:

> "That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the *fundamental conceptions of justice which lie at the base of our civil and political institutions. Hebert* v. *Louisiana,* 272 U. S. 312, 316, 317. (Italics ours.)

See also *Chicago etc. R. R.* v. *Chicago,* 166 U. S. 226, 240; *Murray's Lessee* v. *Hoboken etc. Co.,* 18 How. 272, 276; *Powell* v. *Alabama,* 287 U. S. 45, 65.

There can be no doubt that the order appealed from deprived Russell & Company of property and that—being unreasonable—it deprived it of property without due process of law contrary to Section 2 of the Puerto Rico Organic Act of 1917. It was properly held void by the Circuit Court of Appeals.

We have referred above to cases establishing the rule that where property is taken by unreasonable governmental act, it is taken without due process of law.

It will not be denied that the Public Service Commission in making the cancellation order purported to act in its governmental capacity; that its order, for the purpose of consideration of due process of law, is to be treated as governmental action; that Russell & Company was by the order (if it be held valid) deprived of property; that if the governmental action was unreasonable, this deprivation of property would be without due process of law and would thus be contrary to the Organic Act of Puerto Rico; and that Federal constitutional courts have jurisdiction to inquire into the reasonableness of such governmental action and to hold that action void if unreasonable as taking property without due process of law. The provision of Section 2 of the Organic Act of 1917 (39 Stat. 951) is and was on the date of the cancellation order—

> "That no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws."

The water franchise is, of course, property (*Frost* v. *Corporation Commission,* 278 U. S. 509, 519, 520; *Owensboro* v. *Cumberland Tel. Co.,* 230 U. S. 58, 64); and giving, as it did, the right to use for irrigation 20,000,000 gallons of water daily, it was property of great value. Moreover, as shown by paragraph IV of Russell & Company's answer to the order to show cause of the Public Service Commission (R. 26):

> "* * * In accordance with the provisions of said franchise, this partnership and the former owners of the franchise have spent great sums of money in pipes, pumps, canals and other works for taking and using the water of Guanica Lake, and that the can-

> cellation of said franchise would cause to this partnership a great loss of money and property."

And again at page 7 of the Petition for Certiorari it is admitted that Russell & Company and its predecessors "have taken the 20,000,000 gallons a day of water from the lake to irrigate their lands"—and this Court will take judicial notice that it is a very large agricultural enterprise which will use 20,000,000 gallons of water daily for irrigation.

From the beginning and at every stage of this litigation Russell & Company has pressed the point that the cancellation order deprived it of property without due process of law. In the respondent's answer to the Commission's order to show cause, paragraph IV (R. 26), it was alleged that cancellation of the franchise

> "would be equivalent to the taking of the property of this partnership without due process of law * * * and will be contrary to the fifth and fourteenth amendments of the Constitution of the United States and to the Organic Act of Puerto Rico * * *."

And again in the assignment of errors on its appeal from the order of the Public Service Commission the respondent alleged that the order

> "constitutes a taking of the property of the appellants (respondents here) without due process of law * * *" (R. 7).

It seems clear, then, that the lower courts and the Circuit Court of Appeals were deciding *judicially* whether the order should be upheld as being reasonable or should be reversed as being unreasonable. Not in any sense or

to any extent were these courts deciding the question of "its wisdom from an administrative point of view"; it is not true in any sense that the question before the court was "merely a question of the wisdom of the executive authority in exercising administrative powers admittedly within its province."

Our adversary's discussion of the franchise holder's consent to the terms of the franchise (Petitioner's Reply Brief, pp. 7, 8) is, we submit, wholly irrelevant.

This matter was not mentioned in the petition for the writ; it appears for the first time in the *reply* brief.

We have no quarrel with the time honored maxim "*consensus facit jus*", but what application has it here? If, as we have tried to show above, the law and also, properly construed, Section XVIII of the franchise provides that the reserved power to amend and repeal cannot be exercised unreasonably, it is of no possible importance that the franchise holder consented to the franchise—or if on the other hand, as we strenuously deny, the law and the franchise provide that the reserve power *can* be exercised unreasonably, there is no relevance or appropriateness in discussing the consent of the franchise holder.

If its consent were in question, it is obvious: First, that the Guanica Land Company would not have dreamed of accepting the franchise unless it had believed and expected that the governmental authorities empowered to exercise the reserved power to amend or repeal the franchise would exercise it reasonably; and second, that under the law and the court decisions referred to above this belief was wholly justified.

We might well paraphrase the language of Mr. Justice McReynolds in *Northern Ohio Trade Co.* v. *Akron,* 245 U. S. 574, 585:

> "The circumstances surrounding the grant of 1892 show no intention either to give or accept a mere revocable right. It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners. *Detroit* v. *Detroit Citizens' Street Ry. Co.,* 184 U. S. 368, 384."

POINT II.

In permitting himself to discuss the question whether the order was on the record, actually unreasonable (Petitioner's Brief, pp. 26-28) our adversary has ignored the rule that on review in *certiorari* "the only question for consideration is that stated in the petition for the writ of *certiorari*."

This rule was so stated in *Helvering* v. *Taylor*, 293 U. S. 507, 511.

See, to the same effect, *Clark* v. *Williard*, 294 U. S. 211, 216; *Zellerbach Company* v. *Helvering*, 293 U. S. 172, 182; *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Davis* v. *Currie*, 266 U. S. 182; *Webster Company* v. *Splitdorf Company*, 264 U. S. 463.

The writ of certiorari was here sought on the ground that there is no "controversy" which the Circuit Court of Appeals had jurisdiction to decide—not on the ground that the Court erred in deciding that the order should be reversed because arbitrary and unreasonable. In stating (Petition, p. 20) its "reasons for granting the writ" the petitioner makes clear that the writ is not sought to review a mistake of the Circuit Court of Appeals as to reasonableness but only to determine definitely the "scope of the judicial powers of the United States and of the power of a constitutional court of the United States to review the action of the public service commission" etc. The petitioner's statement of "questions presented" (Petition, p. 2, repeated by reference at petitioner's brief, p. 22) is to the same effect, with the additional mention of parties.

"The principal question here involves the scope of the 'judicial power of the United States' under Article III of the Constitution.

Does the judicial power extend to the review by a constitutional court of the United States of the 'reasonableness' of an order of a public service commission repealing a public utility franchise in accordance with a clause in the original franchise accepted by the grantee expressly reserving the power to repeal it, inserted in the franchise pursuant to a requirement of an Act of Congress?

Another question is whether the six individual respondents here,—the appellants in the Circuit Court of Appeals,—are parties in interest entitled to maintain an appeal from the order of the Public Service Commission of Puerto Rico, and particularly to maintain an appeal from the insular Supréme Court to the Circuit Court of Appeals, in the absence of the corporate entity, the *Sociedad en Comandita,* Russell & Co., Sucrs. S. en C., which alone appears to claim any title to the franchise involved."

We believe that we have shown above that the Circuit Court of Appeals *within its jurisdiction* decided that the Supreme Court of Puerto Rico erred in holding that the order was to be upheld as being reasonable; in its opinion (R. 92) the Circuit Court of Appeals clearly stated its decision on that point. As to reasonableness this decision was for all purposes of this review conclusive. See the last part of the quotation from *Cami* v. *Central Victoria, Ltd.,* 268 U. S. 469, set forth at page 45 below.

POINT III.

No question of "local law" is here involved.

This is proved by the Supreme Court opinion (R. 73) and the Circuit Court of Appeals opinion (R. 91). Each opinion shows that the Court did not consider or decide upon any question of local law but did decide on what each Court considered to be general principles, not peculiar in any way to Puerto Rico.

The construction of Acts of Congress and of the franchise (which is, after all, a document *carefully drawn in English*) is certainly not a matter of local law, nor is the determination of the reasonableness of the Commission's order, in view of the facts found or admitted.

Each of the cases of local law cited by counsel for the petitioner at page 29 of his brief concern some clear matter of local law or procedure, such as the Puerto Rican law of waters, very different from the American, or the construction of tax provisions of the Political Code of Puerto Rico, or the Spanish Law of prescription, or the effect of the Puerto Rican mortgage law, or the liability of one signing a note under the Puerto Rican Civil Code, or the Philippine Civil Code governing parental authority.

Properly understood, the rule of respect for local law *can* have no application in this case—as will, we think, appear from the following recent statements of that rule by this Court. *Cami* v. *Central Victoria, Ltd.*, 268 U. S. 469, was a case which involved a tax ordinance of a Puerto Rico municipality and the tax was attacked on the ground that the ordinance was void. The Circuit Court of Appeals for the First Circuit reversed the judgment of the Supreme

Court of Puerto Rico upholding the tax. The Supreme Court of the United States *affirmed* the judgment of the Circuit Court of Appeals which reversed the Puerto Rican Supreme Court. The court, per Mr. Justice Holmes, said, at page 470:

> "*Had the Circuit Court of Appeals deferred to the local interpretation of Porto Rican statutes, we should not have granted a writ.* We repeatedly have stated the reason for such deference, and we believe that the appellate jurisdiction was granted with other ends in view than that of setting the local courts right in their interpretation of their own laws. *But since the case has been decided the other way we cannot avoid dealing with the merits* and we should not be warranted in reversing the decision under review unless we thought either that it was wrong or at least that there was such plausible ground for the judgment reversed by it, that the local decision ought not to be disturbed." (Italics ours.)

Yu Cong Eng v. *Trinidad,* 271 U. S. 500, 522, a review of a judgment of the Philippine Supreme Court which denied a petition for a writ of prohibition to prevent the enforcement of a Philippine Act making it an offence to keep business books of account in any language except English, Spanish or Filipino. The Court held the law to be invalid. Mr. Chief Justice Taft said, pages 522, 523:

> "The suggestion has been made in argument that we should accept the construction put upon a statute of the Philippine Islands by their Supreme Court, as we would the construction of a state court in passing upon the federal constitutionality of a state statute. The analogy is not complete. The Philippines are within the exclusive jurisdiction of the

United States Government, with complete power of legislation in Congress over them; and *when the interpretation of a Philippine statute comes before us for review, we may, if there be need therefor, re-examine it for ourselves as the court of last resort on such a question.* It is very true that, with respect to questions turning on questions of local law, or those properly affected by custom inherited from the centuries of Spanish control, we defer much to the judgment of the Philippine or Porto Rican courts. *Cami* v. *Central Victoria, Ltd.* 268 U. S. 469; *Diaz* v. *Gonzales,* 261 U. S. 102. But *on questions of statutory construction,* as of the Philippine Code of Procedure adopted by the United States Philippine Commission, *this Court may exercise an independent judgment.* * * *

"*The question of applying American constitutional limitations to a Philippine or Porto Rican statute dealing with the rights of persons living under the government established by the United States, is not a local one,* especially when the persons affected are subjects of another sovereignty with which the United States has made a treaty promising to make every effort to protect their rights. The fundamental law we administer in the Philippine bill of rights was a marked change from that which prevailed in the Islands before we took them over, and is to be enforced in the light of the construction by this Court of such limitations as it has recognized them since the foundation of our own government. In its application here, we must determine for ourselves the necessary meaning of a statute officially enacted in English, and its conformity with fundamental limitations." (Italics ours.)

Philippine Sugar &c. v. *Phil. Islands,* 247 U. S. 385, 390, Mr. Justice Brandeis writing, overruled the construction of a Philippine statute by the Philippine Supreme Court.

> "It is also urged that, since the construction of §285 is a matter of purely local concern, we should not disturb the decision of the Supreme Court of the Philippine Islands. This court is always disposed to accept the construction which the highest court of a territory or possession has placed upon a local statute. *Phoenix Ry. Co.* v. *Landis,* 231 U. S. 578. But that disposition may not be yielded to, where the lower court has clearly erred. *Carrington* v. *United States,* 208 U. S. 1. Here, the construction adopted was rested upon a clearly erroneous assumption as to an established rule of equity. The Supreme Court erred in refusing to consider the evidence of mutual mistake; and its judgment must be reversed."

Again we must say that we do not see why the question of "local law" should be here discussed. The Circuit Court of Appeals has *within its jurisdiction* decided that the judgment of the Supreme Court of Puerto Rico should be reversed, and the writ of certiorari is sought on the ground that there is no "controversy" which the Circuit Court of Appeals had jurisdiction to decide—not on the ground that the Court erred with regard to any local Puerto Rican law or question. As we show under Point II above, the petitioner makes it clear (Petition, p. 20) that the writ is sought only to determine definitively "the scope of the judicial power of the United States and of the power of a constitutional court of the United States to review the action of the public service commission," etc., and at page 2 of the Petition it states as the only questions presented that question and the question of parties.

POINT IV.

The appeal to the Circuit Court of Appeals was properly taken by the partnership "Russell & Company, Sucrs., S. en C.," the owner of that part of the integrated Guanica franchise which refers to the use of waters; and the partnership entity was properly before that Court.

As we understand it, the claim of the petitioner in this Court is that the partnership entity did not appeal to or appear in the Circuit Court of Appeals and was not subject to its judgment.

Why not?

At the risk of prolixity, it may be helpful to note how the partnership Russell & Company, Sucesores, S. en C., has appeared and participated, and from time to time appealed in this litigation. The facts are as follows:

The special appearance before the Public Service Commission was made by "Russell & Company, Sucrs., S. en C., a civil, agricultural partnership composed of Horace Havemeyer, Frank M. Welty, Frank A. Dillingham, Edwin L. Arnold and H. B. Orde, as partners" (R. 23, 24).

The answer to the order to show cause (dated November 21, 1928) of the Public Service Commission began:

> "Now comes Russell & Company, Sucrs., S. en C., a civil, agricultural partnership organized in accordance with the laws of Puerto Rico, composed of Horace Havemeyer, Frank A. Dillingham, Frank M. Welty, Edwin L. Arnold and H. B. Orde, as partners," etc. (R. 24).

The caption of the petition for appeal from the Commission's order to the District Court of San Juan named the appellants as follows:

> "HORACE HAVEMEYER, et al., as Partners of the Civil, Agricultural Partnership Russell & Co., Sucrs., S. en C., Appellants" (R. 1),

and the petition began:

> "Now come Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, members of the civil, agricultural partnership of Puerto Rico, Russell & Co., Sucrs., S. en C., and hereby appeal" etc. (R. 1).

The petition alleges that the persons named, "the appellants herein, are the sole members of said partnership and that as such members the said appellants are the owners" etc. (R. 2).

The "Statement of the Case and Opinion" of the District Court for San Juan, dated June 4, 1930, upon the appeal from the order of the Commission names the plaintiffs as

> "HORACE HAVEMEYER, FRANK A. DILLINGHAM, EDWARD S. PAINE, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, as Partners of the Civil, Agricultural Partnership Russell & Company, Sucrs., S. en C., Plaintiffs" (R. 46),

and this Statement by the District Court says that

> "the appellants, as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C., allege that they are the actual holders of said franchise" (R. 47),

and further, that an appeal from the order of the Commission was taken

> "by Horace Havemeyer et als., as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C." (R. 49).

The judgment in the District Court of San Juan stated that

> "the appellants, Horace Havemeyer, Frank M. Welty, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold and Henry B. Orde, as partners of the civil agricultural partnership, Russell & Co., Sucrs., S. en C., appeared by their counsel," etc. (R. 61).

The opinion of the Supreme Court, dated November 9, 1933, shows as the title

> "HORACE HAVEMEYER et als., Plaintiffs-Appellants,"

and states that

> "the civil agricultural partnership Russell & Company, Sucrs., S. en C., by its partners Horace Havemeyer and others, as grantee of certain rights which the Guanica Land Company had in a franchise, appealed to the District Court of San Juan from a decree of the Public Service Commission of Puerto Rico," etc., and that "Russell & Company appealed from that judgment to this Court" (R. 64, 65).

We have shown fully above the procedure used up to the time of the appeal to the Circuit Court of Appeals. Throughout, this civil agricultural partnership has appeared before the Commission and has appealed to and appeared in the District Court of San Juan and the Su-

preme Court of Puerto Rico by its partners—as such a partnership should. And those courts have fully recognized that the partnership, as a result of such procedure, was properly before them and bound by their judgments.

This our adversary does not and, we believe, cannot deny.

The procedure used by Russell & Company, Sucrs., S. en C., in its appeal to the Circuit Court of Appeals and in its appearance in that Court was exactly the same as the procedure used in the lower courts—to the full satisfaction of those courts; the partnership on the appeal acted by its partners in the same way and with the same result—that the partnership entity was present in the Circuit Court of Appeals and was bound by its judgment. The procedure, in detail, was as follows:

The Assignment of Errors in the appeal to the Circuit Court of Appeals, dated December 18, 1933 (R. 75) begins:

> "Now come the plaintiffs-appellants herein, Horace Havemeyer, Frank A. Dillingham et al., as partners of the agricultural civil partnership Russell & Co., Sucrs., S. en C."

The caption of the citation on appeal, issued January 2, 1934, shows the plaintiffs-appellants to be

> "Horace Havemeyer et al., as partners of the Civil Agricultural partnership of Russell & Company, Sucrs., S. en C."

and the citation cites the Public Service Commission to appear before the Circuit Court of Appeals

> "pursuant to an appeal filed in the office of the Secretary-Reporter of the Supreme Court of Puerto

> Rico in a certain cause lately pending in said Court wherein Horace Havemeyer, Frank A. Dillingham, et al., as partners of the civil agricultural partnership Russell & Company, Sucrs. S. en C. are plaintiffs-appellants," etc.

The caption of the stipulation as to the record on appeal to the Circuit Court of Appeals, dated January 9, 1934 (R. 78) names the appellants as

> "HORACE HAVEMEYER ET AL., as partners of the Civil Agricultural partnership RUSSEL & Co. SUCRS. S. EN C."

This stipulation was signed (R. 79) on behalf of the Public Service Commission by the Attorney-General of Puerto Rico and the Assistant Attorney-General and the order of the Chief Justice of the Supreme Court of Puerto Rico, approving that stipulation, was apparently endorsed at the foot of the stipulation (R. 79).

The caption of the order of enlargement of time for docketing the case in the Circuit Court of Appeals (R. 80) named the appellants as

> "HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs. S. en C.), Appellants."

> NOTE: The matters above quoted from the citation on appeal, the stipulation and order of enlargement are not printed in the record, but we shall present at the hearing a certificate of the Clerk of the Circuit Court of Appeals for the First Circuit showing the form of these captions.

The caption of the Opinion of the Circuit Court of Appeals filed January 10, 1935 (R. 80) names the appellants as

"HORACE HAVEMEYER et al. (Russell & Co., Sucrs., S. en C.), Appellants"

and in overruling the contention of our adversary that Russell & Co., Sucrs., S. en C., a civil agricultural partnership, was not a party to the appeal, the Court said (R. 81):

"The order to show cause was issued to 'Russell & Company, S en C, a limited partnership.' That company is here."

The caption of the judgment of the Circuit Court of Appeals, dated January 10, 1935 (R. 93) named the appellants as

"HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs. S. en C.), Appellants."

NOTE: This caption is not printed in the record, but we shall present at the hearing a certificate of the Clerk of the Circuit Court of Appeals for the First Circuit showing the form of this caption.

The order in this Court extending the time within which to apply for writ of certiorari, which was obtained by the petitioner on April 4, 1935, carries the following caption:

"Horace Havemeyer, et al. (Russell & Company, Sucrs., S. en C.), Respondents *v.* Public Service Commission of Puerto Rico, et al., Petitioners."

NOTE: The caption of the last mentioned order is not printed in the record, but the caption appears on the order on file in this Court.

From the foregoing review of procedure, we believe that we have established that:

The Courts in Puerto Rico, who well understood the character of the partnership entity and the way in which such an entity should act in litigation, considered and stated that the appeals and appearances were proper and that the partnership entity was present in their courts; no motion to dismiss was made for lack of a necessary party;

If it be a question of local law how such an entity should be named in the courts and in court papers, the Puerto Rican courts have shown their view upon such local law;

The procedure used throughout, both in the Puerto Rican courts and in the Circuit Court of Appeals, was sensible and could not mislead; the names used to describe the entity were clear and could not be misunderstood;

Neither the Public Service Commission nor the Puerto Rican courts nor the Circuit Court of Appeals found it objectionable that the names of all the partners should be mentioned; and if it could be considered (which we do not believe) that by naming the individual partners the individuals were made parties to the appeals, no party or Court made any objection;

If the use of the individual names was objectionable, it could only be so as a misnomer of the partnership entity; such a misnomer, which clearly described the entity, should be ignored,—and must be ignored where, as here, no appropriate motion has been made to correct the misnomer;

In the Circuit Court of Appeals as well as in the Puerto Rican courts, the court has been satisfied with the procedure. Each court has clearly indicated that the partnership entity was before it and this was expressly stated by the Circuit Court of Appeals after considering the point now raised.

Our adversary has made no motion in any court based upon the objection now made; and not having raised the point in some appropriate way at the beginning, in the District Court of San Juan, it is now too late. *Baltimore & Potomac R. R.* v. *Fifth Baptist Church*, 137 U. S. 568.

In short, although Russell & Company, Sucesores, S. en C., is a juridical entity and although for the purpose of determining the jurisdiction of Federal Courts based on diversity of citizenship the residence of the members is presumed to be that of the entity, as in the case of corporations (*Puerto Rico* v. *Russell & Co., et al.*, 288 U. S. 476), it is, nevertheless, a *partnership* entity and not a corporation, and must act not by a President or Board of Directors but by its partners. It has properly so acted throughout this litigation and has, by the procedure outlined above, consistently named the partnership entity as appellant and made it subject to the judgment of the Circuit Court of Appeals. How else, indeed, could this partnership entity have appeared or participated in the proceedings on appeal?

The Puerto Rican law is like the general American law —that the activities of partnerships, both general and limited, whether in court or outside, are directed and determined by partners themselves.

Without going fully into the Puerto Rican law, we may quote a few sections which we believe sufficiently show that the foregoing statement is correct. The citations refer to the Codes "Revised and published, under the provisions of Joint Resolution No. 18 of 1930, by the Legislative Joint Commission created by Act No. 50 of 1928."

> *Code of Commerce—Sec. 101.* "As a general rule, partnerships shall be established under one of the following forms:

1. As a regular general partnership where all the partners collectively and under a firm name bind themselves to share the same rights and obligations in such proportion as they may establish.

2. As special partnerships (*comanditaria*) where one or several partners contribute a specific amount of capital towards the common fund, to share in the results of the firm's transactions carried out exclusively by others under a collective name.

Partnerships may also be established in corporate form in accordance with the special law expressly authorizing it."

Code of Commerce—Sec. 123. "Limited copartnerships (*compañía en comandita*) must transact business under the name of all the members thereof, of several of them, or of one only, it being necessary to add in the latter two cases to the name or names given, the words 'and company' and in all cases the words 'limited copartnership' ('*sociedad en comandita*')."

Civil Code—Sec. 1556. "Partnership is a contract by which two or more persons bind themselves to contribute money, property or industry to a common fund, with the intention of dividing the profits among themselves."

Civil Code—Sec. 1586. "Should no agreement have been made with regard to the form of management, the following rules shall be observed:

1. All the partners shall be considered agents, and whatever any one of them may do by himself shall bind the partnership; but each one may oppose the act of the others before they may have produced any legal effect," etc.

Civil Code—Sec. 1591. "Partnership is dissolved:

1. When the term for which it was constituted expires.

2. When the thing is lost, or the business, for which it was constituted ends.

3. By the natural death, civil interdiction, or insolvency of any of the partners, and in the case prescribed in Section 1590.

4. By the will of any of the partners, subject to the provisions of Sections 1596 and 1598.

The partnerships referred to in Section 1561 are excepted from the provisions of numbers 3 and 4 of this section, in the cases in which they should exist, according to the Code of Commerce."

Code of Civil Procedure—Sec. 73. "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such case being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability."

It is certainly immaterial whether in a litigation like this the partnership entity should be designated as "Russell & Co., Sucrs., S. en C. by its partners, Horace Havemeyer, and others" or on the other hand, "Horace Havemeyer and others, as partners of the civil agricultural partnership, Russell & Co., Sucrs. S. en C." Words and the order of words are often important, but certainly not here.

Our adversary is apparently misled by the decision in *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, for he has per-

mitted himself no less than four times to refer to Russell & Company as a "corporate entity" or "corporate body" (Petition for Certiorari, p. 3, Brief in Support of Petition, pp. 25 and 30). His whole argument on parties seems based on the assumption that the partners of Russell & Company have no more control or importance or interest in the partnership than stockholders in a corporation (see Reply Brief, p. 9). The decision in the case cited gives no support for such a view. The decision is that under the Puerto Rican law the civil agricultural partnership of Russell & Company, Sucesores, S. en C., is a juridical entity and, "*as in* the case of a corporation, its domicile rather than that of its members determines citizenship for the purpose of Federal jurisdiction" (p. 479). "Only this and nothing more."

On the whole, we cannot improve upon the statement of the Circuit Court of Appeals, overruling, after full consideration, the contention regarding lack of parties made before that Court (R. 80):

> "It is urged by counsel for the appellees that the individual appellants as members of the Sociedad en Comandita, Russell & Company, a form of limited partnership organized under the Code of Commerce of Puerto Rico (1930), Sec. 95, have no standing here as appellants, since the Supreme Court in People of Puerto Rico *v.* Russell & Company et al., 288 U. S. 476, held that it was a juridical entity, at least, for the purpose of giving the insular courts jurisdiction, it having its domicile in Puerto Rico. It is of no importance whether the individual members of Russell & Company are parties to this appeal.
>
> The order to show cause was issued to 'Russell & Company, S en C, a limited partnership.' That

company is here. Throughout the entire proceedings it has been designated as a civil agricultural partnership, or a limited partnership, as it appears it is, Secs. 125, 156 of the Commercial Code, Civil Code (1930) Sec. 1590, and every order and judgment has been against it in that capacity. It is too late now to raise the point. Russell & Company as a Sociedad en Comandita, having been proceeded against and consented to be treated in the proceedings as a civil agricultural partnership, we think it may be considered bound by whatever judgment may be rendered."

POINT V.

Irrespective of the matters argued under Point I, the judgment of the Circuit Court of Appeals can and should be sustained on the independent and more fundamental ground—that on a proper construction of the pertinent acts of Congress, the Public Service Commission had no power or jurisdiction to make the order appealed from.

This point the Respondents have consistently urged from the beginning of the litigation (R. 3, 4, 5, 24, 26, 51, 68, 76, 86). By its opinion, the Circuit Court of Appeals, against our contention, upheld the jurisdiction of the Commission; it based its reversal of the Supreme Court judgment upon its decision—which we believe to be correct—that the Commission made an unreasonable order and thus overstepped its power. But this Court will not reverse a judgment correct in result even though it should find that the lower court based that judgment upon a wrong ground. The recent case of *Langnes* v. *Green,* 282 U. S. 531, 535, *et seq.,* is sufficient authority for the rule that in review on certiorari as well as upon writ of error, this court "must enter the judgment which should have been rendered by the court below on the record before it"; in that case the petitioner for certiorari urged that "since the decision below upon this point was against the respondent and he has not applied for certiorari, the point is not open here for consideration." The court, after reviewing the decisions, held that "the objection is without merit."

Moreover, in stating the "reasons for granting the writ," the petitioner seems to admit that the question of "the nature and extent of the powers of the Public Service

Commission of Puerto Rico is of very great interest and importance to the people of Puerto Rico and to the Insular Government'' (Petition, p. 2).

We shall show:

That the right to modify or repeal the Guanica franchise was reserved only to Congress;

Congress has never delegated it to the Puerto Rican Legislature or to the Public Service Commission and has not itself exercised it;

Even if it be considered that the power was reserved to the Executive Council it was not, on the dissolution of the Council, transferred by Congress to the Public Service Commission or to the Puerto Rican Legislature;

The Legislature did not have and could not grant that power to the Public Service Commission; and Section 60 of the Public Service Commission Act (Act No. 70, Puerto Rico Laws of 1917, Vol. II, p. 514), even if it could be construed as giving that power to the Commission, must be held invalid for lack of power in the Legislature to confer that power upon the Commission.

The power to amend, alter or repeal the Guanica franchise—as well as the power to modify and annul—was by the Organic Act of 1900 and the joint resolution and the franchise itself reserved solely to Congress and never vested in the Executive Council.

The original Organic Act (31 Stat. 77) passed on April 12, 1900, established a government for Puerto Rico. It created the Executive Council as the Upper House of the Puerto Rican Legislature. The general legislative functions were to be exercised by the Executive Council and the House of Representatives, but by Section 32 (31 Stat.

83) the power to grant franchises was vested solely in the Executive Council with the express reservation to Congress of the power to "annul or modify" the same.

> "Sec. 32. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however,* That all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

After the Organic Act was passed, Congress apparently felt that its reserved power to "annul or modify" franchises should appear upon the face of every franchise and it put that burden upon the Executive Council by Section 3 of a Joint Resolution of May 1, 1900 (31 Stat. 715), eighteen days after the passage of the Organic Act. It granted no power to the Executive Council to annul or modify or to amend, alter, or repeal, but it put the duty on the Council of including in every franchise, so that he who ran might read, an express provision that the franchise was subject to "amendment, alteration, or repeal." This provision, together with certain other provisions restricting the power and discretion of the Executive Council in the matter of

franchises, was included in the first sentence of Section 3 of the Joint Resolution (31 Stat. 716), which reads as follows:

> "Sec. 3. *That all franchises, privileges or concessions granted under section thirty-two of said Act shall provide that the same shall be subject to amendment, alteration, or repeal;* shall forbid the issue of stock or bonds, except in exchange for actual cash, or property at a fair valuation, equal in amount to the par value of the stock or bonds issued; shall forbid the declaring of stock or bond dividends; and, in case of public-service corporations, shall provide for the effective regulation of the charges thereof and for the purchase or taking by the public authorities of their property at a fair and reasonable valuation." (Italics ours.)

Such was the law when the Guanica franchise was granted on March 19, 1901. The franchise contains the following provisions (R. 13, 14):

> "XVIII. *In accordance with Section 3 of Public Resolution No. 23 approved May 1st, 1900,* it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal; and that issue of stock or bonds, except in exchange for actual cash, or property at a fair valuation, equal in amount to the par value of the stock or bonds issued, and the declaration of stock or bond dividends, are forbidden." (Italics ours.)
>
> "XX. The franchises, privileges, concessions and authority hereby granted, are granted in accordance with and subject to the provisions of the existing laws now in force in Porto Rico and all terms hereof shall be construed in accordance therewith."

It is significant that in creating the Executive Council by this, the first Organic Act, Congress showed clearly that its act of creation was complete—that no *further* power could be granted by the Puerto Rican legislature or assumed by the Executive Council (for instance, by reserving powers in grants of franchises); Section 18 of the Act provides for the constitution of the Executive Council and says that the Council "in addition to the legislative duties *hereinafter* imposed upon them as a body shall exercise such powers and perform such duties as are *hereinafter* provided for them respectively * * *." (Italics ours.) The maxim *expressio unius* applies here; in so stating these powers, Congress denies that others can be granted, except by Congress itself.

It is true that by Section 3 of the Joint Resolution of May 1, 1900 Congress provided that franchises granted under Section 32 of the Organic Act (authorizing grants by the Executive Council) shall "*in the case of public service corporations* * * * provide for the effective regulation of the charges thereof and for the purchase or taking by the public authorities of their property at a fair and reasonable valuation." If this be construed as giving to the Executive Council the privilege of naming itself as the "public authority" for taking property or regulating charges, this additional Congressional grant of power was limited to "the case of public service corporations." If, on the other hand, it be considered as authorizing the Puerto Rican Legislature to pass a Public Service Act for such regulation and taking of property, again it was limited to "public service corporations." On either construction, it is clear that Congress intended to strictly limit the powers of the Executive Council rather than to extend

those powers, or to authorize the Council to assume new powers, or to authorize the Puerto Rican Legislature to grant new powers.

Except possibly by this provision of the Joint Resolution, there cannot be found any act passed or authorized by Congress which conferred on the Executive Council any power additional to those provided by the act of its creation, Sections 18, 27 and 32 of the original Organic Act. Congress showed itself consistently as very niggardly in granting powers to the Council.

All this is relevant in the construction of the words of the Joint Resolution, repeated in the Guanica franchise, providing that franchises shall be "subject to amendment, alteration or repeal." In deciding whether this reserved power is merely in somewhat altered words the similar power reserved to Congress by Section 32 of the original Act, passed eighteen days before, or whether, on the other hand, the reservation provided by the Joint Resolution shall be construed to be a reservation of power to the Executive Council—thus adding to the powers granted by Section 32 to that Council—we submit that the first construction is the more reasonable, and that ordinary principles of construction and determination of Congressional intent makes the second construction impossible.

The Organic Act, the Joint Resolution and the franchise must be read together, and it clearly appears, we submit, that the power of "amendment, alteration or repeal" under the franchise, and the provision for "amendment, alteration or repeal" in the Joint Resolution of May 1, 1900, and the "power to annul or modify" franchises under Section 32 of the Organic Act, all refer to the same power and that power, however worded, was reserved to Congress—*and to Congress alone.*

This was clearly recognized in Puerto Rico when in 1911, ten years after the grant of the Guanica franchise, the Executive Council of Puerto Rico asked the able and distinguished Attorney General of Puerto Rico, Foster V. Brown, whether the Executive Council possessed the power to amend, alter and repeal the franchises granted by it. He advised by opinion dated May 22, 1911 (Opinions of the Attorney General of Porto Rico, Volume II, 1911, p. 286) that the Executive Council had no such power. He said—and we cannot improve upon his analysis and clarity of statement:

> "As I understand it, Congress by the organic act not only reserved to itself full and complete power to make such alterations and amendments to franchises granted in Porto Rico as come within the just scope of the legislative power, but thereby gave full notice of its intention to retain this power. Every franchise granted in Porto Rico contains that reservation of power to Congress" (p. 293).

And again he said:

> "This power to modify or annul franchises is a very extraordinary power, one that has been very rarely exercised. Congress and the state legislatures usually choose to leave the forfeiture of franchises and charters to the judicial branch of the Government. It seems to me inconceivable that Congress would expressly reserve to itself such an extraordinary power, and at the same time, by mere inference and implication, confer the same extraordinary power upon the Executive Council. It is, I say, inconceivable for another reason that this should be done, because it might at once introduce into the situation a conflict between the power of Congress and that of the Executive Council. I think when

> Congress reserved to itself in the organic act the broad power to modify or annul franchises, at its pleasure, and without cause, this was a withholding from, or denial to, the Executive Council of the right to exercise that extraordinary power'' (p. 295).

Again he says:

> ''Reading and construing the organic act and joint resolution together, I am of the opinion that Congress intended that every grant of franchise in Porto Rico should carry on its face notice to the grantee that it was subject to annulment or modification by Congress under the reserved power to repeal or modify as understood under the decisions of the Supreme Court of the United States * * *'' (p. 298).

The Attorney General summed up his conclusions as follows (p. 313):

> ''1. That Congress reserved to itself the right to modify or annul franchises, rights, privileges, and concessions of a public or quasi-public nature, and that this power may be exercised by Congress against the will and interest of the grantee.
>
> 2. That the Executive Council may not modify or annul franchises, rights, privileges, and concessions against the will of the grantee, but may declare a forfeiture for condition broken or failure to comply with the terms thereof when the Executive Council has, in granting the franchise, right, privilege, or concession, expressly reserved to itself the right to make this declaration of forfeiture on condition broken.
>
> 3. That the Executive Council may modify or amend franchises, rights, privileges, and concessions granted when the amendment or modification is in

furtherance of the original grant, and is made on application of the grantee thereof, or is accepted by the grantee of the franchise after being made by the Executive Council.

4. That the right reserved to Congress to modify or annul franchises, and the right which the Executive Council might reserve to itself in granting any franchise, does not interfere with the right of the judicial department of the government to declare forfeited or annulled any franchise granted by the Executive Council for non-user, mis-user, or abuse, or condition broken, this power being inherent in the courts."

We have shown, we believe, that the power of amendment, alteration or repeal reserved by the Guanica franchise was reserved not to the Executive Council but to Congress and to Congress alone. Congress has admittedly never exercised that power, and at least up to the time of the passage of the Organic Act of 1917 (39 Stat. 951), Congress has never conferred that power upon the Public Service Commission or authorized the granting of that power by the Puerto Rican legislature.

What then of the Organic Act of 1917?

By the Organic Act of 1917, Congress did not confer upon the Public Service Commission created by that Act any power or jurisdiction to exercise the power of amendment, alteration or repeal reserved by the Guanica franchise. Section 38, the only section which could be applicable, confers upon the Commission only "the executive functions relating to public service corporations heretofore conferred by law upon the executive council"; and the reserved power in the Guanica franchise does not relate to a Public Service corporation nor is it a function "conferred by law upon the executive council."

This, we believe, can be clearly demonstrated.

In 1917 Congress passed the new Organic Act of that year. That act ended the existence of the Executive Council, and in its place as the upper body of the bi-cameral legislature it created a senate. It created a public service commission with a full statement of its constitution, its purposes and powers by Section 38, and by Sections 38 and 39 it repeats the provisions of the original Organic Act and the Joint Resolution regarding franchises. The most important parts of those two sections are as follows (39 Stat. 964):

> "Section 38. That all grants of franchises, rights, and privileges of a public or quasi-public nature shall be made by a public service commission, consisting of the heads of executive departments, the auditor, and two commissioners to be elected by the qualified voters at the first general election to be held under this Act, and at each subsequent general election thereafter * * *. *The said commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council.* Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor, and shall be reported to Congress, which hereby reserves the power to annul or modify the same. (Italics ours.)
>
> * * * * * *
>
> The Legislative Assembly of Porto Rico is hereby authorized to enact laws relating to the regulation of the rates, tariffs, and service of public carriers by rail in Porto Rico, and the Public-Service Commission hereby created shall have power to enforce such laws under appropriate regulation.
>
> Section 39. That all grants of franchises and privileges under the section last preceding shall pro-

vide that the same shall be subject to amendment, alteration, or repeal, and shall forbid the issue of stocks or bonds except in exchange for actual cash or property at a fair valuation to be determined by the public-service commission equal in amount to the par value of the stocks or bonds issued, and shall forbid the declaring of stock or bond dividends, and in the case of public-service corporations shall provide for the effective regulation of charges thereof and for the purchase or taking of their property by the authorities at a fair and reasonable valuation."

The above sections did not in anywise change the effect of the original Organic Act of 1900, except that Sections 38 and 39 bring close together the provision clearly reserving to Congress the right to annul or modify and the provision regarding the reserved power of amendment, alteration, or repeal, which provisions were in the original legislation separated by a period of eighteen days; this strengthens our contention that the two provisions mean the same. To Congress alone was reserved the power to annul or modify franchises granted by the Public Service Commission. The Public Service Commission was not granted the right to amend, alter or repeal franchises granted by them, or franchises previously granted by the Executive Council.

Section 38 empowers the Public Service Commission to discharge only "*executive*" functions, and only "*executive functions relating to public-service corporations*", and only such executive functions relating to public service corporations which were "*heretofore conferred by law upon the executive council.*"

This provision certainly did not transfer to the Public Service Commission the function of modifying or repeal-

ing private franchises, but distinctly the contrary. With the whole field before it, Congress chose to confine its transfer of executive functions to those "relating to public service corporations" and the old rule applies, *expressio unius est exclusio alterius.*

Certainly Russell & Company is not, and the Guanica Land Company, the original franchise holder, was not, "a public service corporation", and the power reserved in our franchise was not a power relating to a public service corporation, and the new Public Service Commission was not by Section 38 empowered by Congress to exercise that power.

There should be no confusion on this point, and there can be no doubt.

The petitioner has admitted that Russell & Company is not a public service corporation and that our franchise is essentially a private franchise.

In its order to show cause (R. 17) the Commission says:

> "IV. That the grants, privileges and rights enjoyed by virtue of this franchise are:
>
> (a) The use of water for purposes of irrigation in private lands.
>
> (b) The construction of a private wharf in the harbor of Guanica; and
>
> (c) The construction and operation of a private railway in Guanica.
>
> That said grants, privileges and rights are of a purely private and personal character and that from the wording of the said franchise it does not appear that at any time a service of a public nature is ever rendered."

The President's report, made a part of the cancellation order (R. 30) says:

> "That all these grants, as said before, have a private character."

In his brief before the District Court, counsel for the Public Service Commission, as quoted in the opinion of the District Court (R. 51), asserted:

> "That the appellants, who are members of the partnership Russell & Co., Sucrs., S. en C. *are not a public service corporation* in accordance with the provisions of Section two of Act No. 70 of 1917, nor in accordance with par. XXI of the franchise, which literally quoted reads thus:
>
> " 'Nothing herein in this grant contained, shall be construed to give the said Company, or its successors, or to the assigns in whole or in part of any of the rights and privileges herein granted, the right, directly or indirectly, with or without compensation in money or otherwise, to use, hire, lease, sell or otherwise dispose of the waters of said lake or any part thereof for the purpose of irrigating any lands other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold.' " (Italics ours.)

The District Court opinion approved that statement (R. 51).

These admissions are correct.

Baldwin's Century Edition of Bouvier's Law Dictionary (p. 1002) states that "public service corporations" is "an-

other name for quasi-public corporations," and at page 1009, "A quasi-public corporation is one constituted of private persons to engage in a business, public in its nature, and *where it must serve all who apply.*" (Italics ours.)

14 Corpus Juris, 91, note 34, says:

> "A 'public service corporation' may be defined as a corporation which, although organized and controlled by private persons and for private profit, is for the purpose of serving the public generally * * *."

The Organic Act of 1917 shows that in Section 38 the words are used in the usual sense. Thus, in the following Section 39 of the Organic Act, Congress says that franchises granted by the Public Service Commission "in the case of public-service corporations shall provide for the effective regulation of charges thereof", showing that in the conception of Congress, public-service corporations are corporations which give public service for a charge.

That our franchise does not require or permit the franchise holders to give any public service whatever, is clear.

The title (R. 8) shows that the use of waters is "for Purposes of Irrigation of its Lands" and that the railway is private. Section II (R. 9) as to waters, shows we can use only sufficient waters "for the proper irrigation of the lands now or hereafter owned or leased by the said Company or by its successors or assigns, or any of them." Section VI (R. 10) provides that the railway

> "shall be used for the transportation of cattle, crops, and other goods and effects owned by the said

> company, or its successors or assigns and of its and their agents and employees; *provided, that nothing herein in this clause contained shall be held or construed to give said Company, its successors or assigns the right to transport the crops, goods and effects of any other person, firm or corporation for hire.*" (Italics ours.)

Again, Section IX (R. 10) says that the franchise gives no right to permit the use of the wharf or dock by vessels "of any other person, firm or corporation whatever, for hire or otherwise, for any purpose," nor to give the "right for hire or otherwise, to receive or discharge in its own vessels or the vessels of any other person, firm or corporation, goods, chattels and effects belonging to any other person, firm or corporation."

Again, Section XXI (R. 14) provides that the franchise shall not give

> "the right, directly or indirectly, with or without compensation in money or otherwise, to use, hire, lease, sell or otherwise dispose of the waters of said lake or any part thereof for the purpose of irrigating any lands other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold."

Again, by Section XXII (R. 14) the Executive Council reserves the right to declare the franchise holder "a common carrier with respect to said railroad and wharf and to extend the use of said railroad and wharf to the general public upon such terms and conditions as to rates and

tariffs as the Executive Council may from time to time establish."

Thus, carefully, explicitly and in several different ways, the franchise itself shows that it is private and that (unless the Executive Council should declare it a common carrier, which has not been done) the franchise holders have no right under the franchise to serve the public in any way. How could this be made more clear?

Russell & Company is not a public service corporation within the definitions of the "Act concerning the regulation of public service corporations in Porto Rico (Laws of Porto Rico, 1908, p. 97).

This we show at page 78 below when we discuss that act and its definitions, scope and purpose.

It is interesting, though hardly relevant, that Russell & Company is not a public service company within the definitions of Section 2 of the Public Service Act of Porto Rico (Act No. 70, Laws of Porto Rico, 1917, Vol. II, p. 432).

The definitions of that Act, which became effective on December 6, 1917, cannot be read to include our franchise holders. Section 2 (a) and (c) reads as follows:

> "For the purposes of this Act, public-service companies shall be such natural persons or bodies corporate as may engage in Porto Rico in any of the following pursuits or businesses:
>
> (a) Transportation of persons or freight using in whole or in part marine, fluvial or land routes.
>
> (c) Wharves of all kinds and dry-docks."

Paragraph (h) of Section 2 clearly shows that the holding of a private water franchise is not within the definition of public service company; it provides that

> "None of the provisions of this Act shall apply * * * to the furnishing or distribution of water * * * by a producer who is not otherwise a public-service company, for the sole use of such producer, or for the use of tenants of such producer, and not for the sale to others."

As above shown, the Guanica franchise does not permit the franchise holders to engage in transportation or wharf operation as a pursuit or business, and the Commission admits (R. 17) that "it does not appear that at any time a service of a public nature is ever rendered." Moreover, the provisions of Section 3 of the Public Service Act requiring public service companies to furnish safe service and facilities, to permit service at just and reasonable rates, to make repairs necessary for the safety of its patrons and the public and to fix proper tariffs, shows that whatever may be the wording of the definitions, the Legislature meant to include in the term "public-service companies" only companies engaged in giving public service.

So it is clear that the right to exercise the power of amendment and repeal reserved in the Guanica franchise was not a "function relating to a public service corporation."

Nor was it a function "heretofore conferred by law upon the executive council"; for that reason again that power was not conferred by Section 38 upon the new Public Service Commission.

We have shown above, we believe, that Attorney General Brown was right in advising that under the original

Organic Act and Joint Resolution the right to exercise the reserved power in such franchises as ours had not been "conferred by law upon the executive council" and was vested not in the Executive Council, but in Congress.

What, then, did Congress have in mind in speaking of "executive functions relating to public-service corporations heretofore conferred by law upon the executive council"?

The answer was suggested by the opinion in the Circuit Court of Appeals and is easy. That court says (R. 88):

> "While it (this provision of Section 38) may have related to the executive functions impliedly conferred on the Executive Council by the Joint Resolution of 1900, it may well have referred to the executive functions conferred on the Executive Council relating to public service corporations under the Act of March 12, 1908 entitled 'An Act concerning the Regulation of Public Service Corporations in Porto Rico' ".

If by Section 38 Congress conferred on the Executive Council "the executive functions impliedly conferred upon the Executive Council by the Joint Resolution", it thereby conferred merely the right *"in the case of public service corporations"* to "provide for the effective regulation of the charges thereof and for the purchase or taking by the public authorities of their property at a fair and reasonable valuation"—only this and nothing more. This was the wording of the Joint Resolution referred to. (See our discussion of that provision at pages 62 to 68 above.) If this be the power conferred on the Executive Council, that power can by no possible construction include the power reserved in the private franchise of a franchise

holder who is in no sense a public service corporation, to alter, amend or repeal that franchise.

If, on the other hand, the phrase referred "to the executive functions conferred on the executive council relating to public service corporations" under the Puerto Rican Act of 1908 (Laws of Porto Rico, 1908, p. 97) it is perfectly clear that such functions did not and could not include the right of exercising the power of amendment, alteration or repeal reserved by our private franchise. That Act is entitled "An act concerning the regulation of public service corporations in Porto Rico"; Section 1 provides that it "shall apply to all public service corporations as herein described"—and obviously to no other corporations; Section 2 defines the term "public service corporation" and shows that it applies *only* to public service corporations in the ordinary acceptation of the phrase; and the entire Act merely empowers the Executive Council to regulate the tariffs, service, etc. of public service corporations and gives it the necessary powers incidental to enforce such regulations as it may make under the provisions of the Act. That the purpose of this Act is as stated is shown by the following extract from Section 3 of Act No. 31 of March 9, 1911 (Laws of Porto Rico, 1911, p. 116) amending the 1908 Act:

> "• • • it being the intention of this act to confer on the Executive Council of Porto Rico the right and power to secure to The People of Porto Rico a good public service from all public service corporations operating in Porto Rico; and full and plenary power is hereby given to the said Executive Council to inquire into the kind, and character, of the service being furnished in Porto Rico by any public service corporation operating therein, and to make

any and all orders which shall, in its discretion, tend to secure a good and proper service to the public from such public service corporations."

Neither by express word or implication do either of these statutes give to the Executive Council any power to amend, repeal, cancel or forfeit any franchise or right thereunder, whether the franchise be public or private, new or old, or connected with public service or not. How, then, can it be argued that the power to amend or repeal our pre-existing private franchise was conferred by these statutes upon the Executive Council?

Thus, whether by Section 38 Congress intended to confer on the new Public Service Commission the executive functions impliedly conferred by the Joint Resolution or those relating to public service corporations conferred under the Puerto Rican Act of 1908; in neither case can it be held that the power so conferred by Congress included the right to exercise the power reserved by our private franchise.

By this analysis and review of the new Organic Act of 1917, we believe that we have proved that Congress did not by that act confer upon the new Public Service Commission any right to exercise the power reserved by our franchise.

But even if Congress never itself conferred on the new Public Service Commission any right to amend, alter or repeal our private franchise, nevertheless, it is said, the Puerto Rican Legislature did by Section 60 of the Public Service Act passed by it in 1917 grant to the new Public Service Commission the right to exercise that reserved power.

There is a two-fold answer. First, Section 60 was not intended to apply to private franchises, and second, if so

intended it was to that extent invalid because of lack of power of the Legislature to enact it.

Section 60 (Laws of Puerto Rico, 1917, Vol. II, p. 514) reads as follows:

> "Section 60.—*Violation of existing franchises.*—Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Executive Council and is now in force; *Provided, however,* that the commission shall have the power to alter, amend, modify or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law."

Section 2 of the Public Service Act shows that neither this Section nor any other provision of the Act was intended to apply to a private water franchise or the holder of such a franchise.

Section 2 specifies the persons or bodies corporate included as public service companies for the purposes of the act, and it expressly provides (Laws of Puerto Rico, 1917, Vol. II, pp. 432, 434):

> "that none of the provisions of this Act shall apply to the generation, transmission or distribution of electricity; to the manufacture or distribution of gas; *to the furnishing or distribution of water;* or to the production, delivery or furnishing of steam or any other substance for heat or power, *by a producer, who is not otherwise a public service company, for the sole use of such producer, or for the use of tenants of such producer, and not for the sale to others.*" **(Italics ours.)**

Sections II and XXI (R. 9, 14) of the franchise show clearly that the holder of the water part of the franchise can use the water only for his own use or for the use of other assignees of the Guanica Land Company. Accordingly, Section 60 can have no application to Russell & Company or to the water part of the franchise held by it, and by that token Section 60 was not intended to confer and does not confer upon the Public Service Commission any right to amend, alter or repeal the water part of the Guanica franchise.

If Section 60 be read as conferring on the Public Service Commission the power to amend or repeal the private Guanica franchise, it must be ignored as invalid because the Puerto Rican Legislature had no possible power to enact a section conferring that right.

The Puerto Rican Legislature can exercise only powers granted by Congress; and prior to 1927 Congress nowhere expressly or impliedly conferred on the Legislature the power to make any such grant to the Public Service Commission.

On the contrary, Congress in effect forbade the granting of such a power, when by Sections 38 and 39 of the new Organic Act of 1917 it created a Public Service Commission and granted to it and by carefully chosen and clear words outlined its powers. In attempting to enlarge those powers and in a Public Service Act to go outside of all questions of public service and confer upon a Public Service Commission created by Congress powers over a private franchise, and thus to change the character of the Commission fixed by Congress, the Legislature assumed a power which it did not have. The last sentence of Sec-

tion 38 gave to the Legislature express but strictly limited authority in the field of public service but the limitations of this authorization negative any intention by Congress to allow the Legislature to confer on the Commission powers over a private franchise. This sentence reads as follows:

> "The Legislative Assembly of Porto Rico is hereby authorized to enact laws relating to the regulation of the rates, tariffs and service of public carriers by rail in Porto Rico, and the Public Service Commission hereby created shall have power to enforce such laws under appropriate regulation."

We cannot insist too strongly that Section 60 in so far as it applies to private franchises does not belong in a Public Service Law and is not justified or validated by authority to pass a Public Service Law; and, moreover, that it goes far beyond Sections 38 and 39 of the new Organic Act of 1917 and is inconsistent therewith. If the section, appearing as it does in a Public Service Law, is construed to apply to existing private franchises, it is in so far invalid.

It is interesting that in 1927, long after Section 60 was enacted, someone realized that the Puerto Rican Legislature might wish to confer additional powers upon the Public Service Commission and that under the Organic Act of 1917 legislation (like Section 60) conferring such powers would be invalid. At any rate, on March 4, 1927, Congress (44 Stat. 1420, §6) amended Section 38 of the Organic Act of 1917 so that the part in question read as follows:

> "* * * The said commission is empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council *and such*

additional duties and functions as may be conferred upon said commission by the legislature. Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor and shall be reported to Congress, which hereby reserves power to annul or modify the same." (Italics show the amendment.)

Thus, in 1927 Congress provided that the Puerto Rican Legislature might *thereafter* confer—and the Public Service Commission created by Congress might validly exercise—duties and functions "*additional*" to "the executive functions relating to public-service corporations heretofore conferred by law upon the executive council." Could Congress show more clearly that it considered that under the original form of the section and until 1927 the functions of the Commission were limited to those relating to public service corporations, etc., and further, that the Legislature until the amendment of 1927 could confer no duties and functions upon the Commission "additional" to those relating to public service corporations?

It may be that after March 4, 1927 the Puerto Rican Legislature had the power to pass a new section which would confer on the Public Service Commission rights over old private franchises. But when Section 60 of the Public Service Act became effective on December 6, 1917, the Legislature had no such power or authority, and so far as concerns the Guanica franchise, Section 60 must be ignored.

Whether the reserved power is to be considered executive or legislative, the Legislature had no power to confer it upon the Public Service Commission.

Whichever horn of this dilemma may be grasped, it is clear that wherever the reserved power vested upon the

abolition of the Executive Council by Congress, there it still remains; Section 60 was ineffective to transfer it to the Public Service Commission, even if the Legislature so intended.

The Organic Act of 1917 makes a clear division of governmental powers in Puerto Rico. Sec. 25 (39 Stat. 958) provides that

> "All local legislative powers in Porto Rico, except as otherwise provided, shall be vested in a legislature," etc.

and Sec. 40 (39 Stat. 965) provides that

> "The judicial power shall be vested in the courts and tribunals of Porto Rico now established and in operation under and by virtue of existing laws."

And Secs. 12 ff. (39 Stat. 955, ff.) provide for the vesting of executive power in the Governor and other officials and Secs. 37 and 53 (39 Stat. 964, 968) provide that new executive departments shall not be created by the Legislature and that bureaus or offices shall be transferred and assigned by the Governor, with the approval of the Senate.

If it be considered that the reserved power to cancel a part of the Guanica franchise was a *legislative* power, and further, that that power was originally vested in the Executive Council, and further, that upon the abolition of the Council it passed to the Puerto Rican Legislature—that legislative power could be exercised by the Legislature itself but could not be by it delegated to the Commission, broadly and absolutely, without fixing clear standards, etc.; the broad language of Section 60 would not constitute a valid delegation of such a legislative power.

If, on the other hand, it be considered that that reserved power was an *executive* power, originally lodged in the Executive Council, that power on the abolition of the Executive Council on March 2, 1917, must, in the absence of any Congressional provision to the contrary, have passed to the executive branch of the Puerto Rican government; under the division of powers established by the Organic Act of 1917 between the executive, legislative and judicial branches, the Legislature could certainly not take that executive power away from the Governor or the Governor and Council and transfer it to the Public Service Commission. The *Springer* case, 277 U. S. 189, is an interesting case coming from the Philippine Islands and discussing the question of use or delegation of executive powers by the Legislature.

It is also said that Section 60 is authorized by the general grant to the Puerto Rican legislature of legislative power by Sections 25 and 37 of the Organic Act of 1917 and further that the Public Service Act, including Section 60, was duly reported to Congress and never annulled by Congress.

It is sufficient to say that the entire Organic Act must be read together and the extent of general legislative powers granted in Sections 25 and 37 is limited by Section 38, by which Congress itself decides what the new Public Service Commission shall be and to that extent limits the legislative powers.

As to the failure of Congress to annul the Public Service Act when submitted to it, we need only quote two decisions.

In *Berryman* v. *Whitman College*, 222 U. S. 334, 353, Mr. Chief Justice White said:

> "The only principal contention remaining unnoticed is the alleged acquiescence of Congress in the grant of exemption resulting from its failure to disapprove the act of 1883. Rev. Stat., §1850. The foundation, however, upon which the contention rests has been decided to be without merit. *Clayton* v. *Utah*, 132 U. S. 632, 642."

In *Clayton* v. *Utah Territory*, 132 U. S. 632, 642, the Court held:

> "It is true that in a case of doubtful construction the long acquiescence of Congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the legislature to enact it. At all events, it can hardly be admitted as a general proposition that under the power of Congress reserved in the organic acts of the Territories to annul the acts of their legislatures the absence of any action by Congress is to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of Congress under which they were created."

Thus, we submit, the cancellation order of the Public Service Commission was made without power or authority either from Congress or from the Puerto Rican legislature and was consequently void, and the judgment of the Circuit Court of Appeals should be affirmed on that ground, if no other.

Conclusion.

The judgment of the Circuit Court of Appeals for the First Circuit should be affirmed.

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FEDERAL RADIO COMMISSION
v.
NELSON BROTHERS BOND & MORTGAGE CO. (Station WIBO).

(289 U. S. 266)

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 657. Argued April 11, 1933.—Decided May 8, 1933.

* * * * * * *

CERTIORARI, 288 U. S. 597, to review the reversal of an order of the Federal Radio Commission licensing a broadcasting station in Indiana to operate on a radio frequency theretofore assigned to and enjoyed by two stations in Illinois, and terminating the licenses of those stations.

* * * * * * *

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Johnson-Kennedy Radio Corporation, owning Station WJKS at Gary, Indiana, applied to the Federal Radio Commission for modification of license so as to permit operation, with unlimited time, on the frequency of 560 kc. then assigned for the use of Station WIBO, owned by Nelson Brothers Bond & Mortgage Company, and Station WPCC, owned by the North Shore Church, both of Chicago, Illinois. These owners appeared before the chief examiner, who, after taking voluminous testimony, recommended that the application be denied. The applicant filed exceptions and, on consideration of the evidence, the Commission granted the application and directed a modified license to issue to the applicant authorizing the operation of Station WJKS on the frequency of 560 kc. and terminating the existing licenses theretofore issued for

Stations WIBO and WPCC. On appeal, the Court of Appeals of the District of Columbia reversed the Commission's decision upon the ground that it was "in a legal sense arbitrary and capricious." 61 App. D. C. 315; 62 F. (2d) 854. This Court granted certiorari.

* * * * * *

First. Respondents challenge the jurisdiction of this Court. They insist that the decision of the Court of Appeals is not a 'judicial judgment'; that, for the purpose of the appeal to it, the Court of Appeals is merely a part of the machinery of the Radio Commission and that the decision of the Court is an administrative decision. Respondents further insist that if this Court examines the record, its decision "would not be a judgment, or permit of a judgment to be made in any lower court, but would permit only consummation of the administrative function of issuing or withholding a permit to operate the station."

Under § 16 of the Radio Act of 1927, the Court of Appeals, on appeal from decisions of the Radio Commission, was directed to "hear, review, and determine the appeal" upon the record made before the Commission, and upon such additional evidence as the Court might receive, and was empowered to "alter or revise the decision appealed from and enter such judgment as to it may seem just." 44 Stat. 1169. This provision made the Court "a superior and revising agency" in the administrative field and consequently its decision was not a judicial judgment reviewable by this Court. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 467. The province of the Court of Appeals was found to be substantially the same as that which it had, until recently, on appeals from administrative decisions of the Commissioner of Patents. While the Congress can confer upon the courts of the District of Columbia such administrative authority, this Court cannot be invested with jurisdiction of that character whether for the purpose of review or otherwise. It cannot

give decisions which are merely advisory, nor can it exercise functions which are essentially legislative or administrative. *Id.*, pp. 468, 469. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 442-444; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 700.

In the light of the decision in the *General Electric* case, *supra*, the Congress, by the Act of July 1, 1930, c. 788, amended § 16 of the Radio Act of 1927 so as to limit the review by the Court of Appeals. 46 Stat. 844; 47 U. S. C. 96.[2] That review is now expressly limited to "questions of law" and it is provided "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious." This limitation is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the

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[2] By this amendment, § 16 (d) reads as follows:

"At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal." 46 Stat. 844; 47 U.S.C. 96.

In reporting this amendment, the Committee on the Merchant Marine and Fisheries of the House of Representatives stated: "The purpose of the amendment is to clarify the procedure on appeal to the court from decisions of the Federal Radio Commission, to more clearly define the scope of the subject matter of such appeals, and to insure a review of the decision of the Court of Appeals of the District of Columbia by the Supreme Court." H.R.Rep. No. 1665, 71st Cong., 2d Sess., p. 2.

Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review. Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547, 548; *New England Divisions Case*, 261 U. S. 184,

203, 204; *Keller* v. *Potomac Electric Power Co., supra; Chicago Junction Case,* 264 U. S. 258, 263, 265; *Silberschein* v. *United States,* 266 U. S. 221, 225; *Ma-King Products Co.* v. *Blair,* 271 U. S. 479, 483; *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 30; *Tagg Bros.* v. *United States,* 280 U. S. 420, 442; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 654; *Crowell* v. *Benson,* 285 U. S. 22, 49, 50.

If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not "be misled by a name, but look to the substance and intent of the proceeding." *United States* v. *Ritchie,* 17 How. 525, 534; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 479; *Federal Trade Commission* v. *Eastman Co.,* 274 U. S. 619, 623; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 722-724. "It is not important," we said in *Old Colony Trust Co.* v. *Commissioner, supra,* "whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law." Nor is it necessary that the proceeding to be judicial should be one entirely *de novo.* When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power. The provision that, in case the Court reverses the decision of the Com-

mission, "it shall remand the case to the Commission to carry out the judgment of the Court" means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law. The procedure thus contemplates a judicial judgment by the Court of Appeals and this Court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous. *Osborn* v. *United States Bank*, 9 Wheat. 738, 819; *In re Pacific Railway Commission*, 32 Fed. 241, 255; *Federal Trade Commission* v. *Klesner, supra; Federal Trade Commission* v. *Raladam Co., supra; Old Colony Trust Co.* v. *Commissioner, supra.*

* * * * * *

We find no ground for denying effect to the Commission's action. The judgment of the Court of Appeals is reversed and the cause is remanded with direction to affirm the decision of the Commission.

Reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 115.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,

Petitioner,

vs.

HORACE HAVEMEYER, *et al.* (RUSSELL & COMPANY, SUCRS., S. EN C.),

Respondents.

PETITION OF RESPONDENTS FOR REHEARING.

RALPH S. ROUNDS,
Attorney for Respondents-Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Respondents.

PETITION OF RESPONDENTS FOR REHEARING.

This is a review on certiorari to the Circuit Court of Appeals for the First Circuit of its judgment entered on January 10, 1935 which reversed the judgment of the Supreme Court of Puerto Rico and remanded the case for further proceedings not inconsistent with the opinion (R. 80, 93).

The action concerned the validity or invalidity of an order made by the petitioner above named on March 8, 1929 (R. 27, 28) purporting to cancel that part of a franchise of the respondents relating to the use of certain waters of Guanica Lake in Puerto Rico for purposes of irrigation. The respondents maintained that the order was invalid because of the lack of power in the Commission to cancel the franchise and because if it had power the order was

unreasonable. The Circuit Court of Appeals held that the Commission had power but that the order of cancellation was unreasonable.

Upon the hearing on the certiorari in this Court, the petitioner questioned the jurisdiction of the Circuit Court of Appeals and also raised a question of parties, and the respondents raised again the question of the power of the Public Service Commission.

This court held, by the opinion of Mr. Justice Butler, given on January 6, 1936, that the Circuit Court of Appeals had jurisdiction, that there was no defect of parties and that the Public Service Commission had power to make the cancellation order in question.

But by the last paragraph of the opinion, numbered "4" (P. 10), the court held that the order of cancellation was not shown to be "capricious, arbitrary or otherwise contrary to law" and that the respondents had failed to establish any ground upon which it might be set aside. The judgment of the Circuit Court of Appeals was for that reason reversed. The judgment of this court was entered on January 6, 1936.

The part of the opinion in question is as follows:

> "4. The facts disclosed by the record support the conclusion of the commission and insular courts that the holder of the irrigation privilege is responsible for the overflow and resulting damages to private and public property. Reasonably construed, the franchise must be held to have given to the grantees control of the outlet and to have bound them to keep it sufficiently clear, for the passage of waters from the lake to the bay, to prevent raising them above the designated levels. The findings of fact included in

> the report of the commission and decisions of the insular courts, based as we must assume on adequate evidence, indicate that Russell & Company allowed the outlet to become and remain filled up and that the obstruction caused the waters to overflow and keep submerged the large contiguous area that is above referred to. Having regard to the quasi public nature of the privilege, the extended period of the holder's default, the character of the resulting damages and the commission's authority to terminate for breach of condition on which the grant was made, the order of cancellation is clearly not shown to be capricious, arbitrary or otherwise contrary to law. Russell & Company have failed to establish any ground upon which it may be set aside. *Kern River Co.* v. *United States,* 257 U. S. 147, 155; *Farnsworth* v. *Minn. & Pac. R. R. Co., supra,* 68; *Union Land & Stock Co.* v. *United States,* 257 Fed. 635, 637."

The respondents respectfully ask for rehearing upon the question of the reasonableness of the cancellation order, that is, the question whether on the one hand the judgment of the Circuit Court of Appeals should be reversed on the ground that the cancellation was reasonable and not capricious or arbitrary, or whether, on the other hand, it should be affirmed on the ground that it was right in holding the cancellation "arbitrary and unreasonable."

The grounds for this petition are that the respondents have never been heard before this court upon the question of reasonableness, and that we believe that upon rehearing we can satisfy the court that—even if the respondents could be considered to be in some default—the forfeiture of their franchise was neither a reasonable remedy for the flood situation nor a reasonable punishment for the default; and further, that the franchise, properly construed, did not

impose on them the obligation to keep down extraordinary flood waters, and that the respondents were not in "default" under the franchise and were chargeable with no breach of condition; and further, that no public interest require the cancellation but rather the contrary.

The respondents have not in this court been heard either orally or by brief upon the question of reasonableness or upon any of the points above specified; that question was not specified in the petition for certiorari as one of the questions presented, and the respondents believed—and so stated in their brief in this court—that under the decided cases the question of reasonableness was not open in this court. As this court by its opinion holds in effect that the Commission's order was reasonable and decides against the respondents upon that ground, the respondents pray for a rehearing so that they may now be heard upon that question.

By Point II of respondents' main brief in this court (p. 42) they referred to the rule that on review in certiorari "the only question for consideration is that stated in the petition for the writ of certiorari," and showed by quotation that both in its petition (p. 2) and in its brief (p. 22) the questions raised on certiorari were distinctly stated and did not include expressly or impliedly the question whether the order was actually unreasonable. This court has held that the question of reasonableness was "adequately raised by the petition though not specified formally as are the others or presented in accordance with the best practice", and we attach hereto as an Appendix a copy of our Point II above mentioned, not by way of argu-

ment but to show that in this court we omitted all discussion of reasonableness in the belief that it was settled by court below and was not open here and to show further that we made our position clear to this court and to the petitioner.

The result was that this vital question upon which the decision of this court was based and which involved important matters of law and fact, has not been argued here by the respondents either orally or by brief and that it was not seriously argued by the petitioner. The judgment of the Circuit Court of Appeals was reversed and the forfeiture of the respondents' franchise was upheld without hearing the respondents upon the determinative question of reasonableness.

ONE: We believe, and shall below attempt to show, that the respondents are in no "default."

But even if they are considered to be in some default, we submit that under all the circumstances the forfeiture of the franchise is not a reasonable penalty and should not be imposed.

Any penalty is unreasonable unless commensurate with the default. The respondents' duty and the degree of their fault—if any—can be determined only by consideration of the situation and circumstances. These we wish to present fully—as they have not yet been presented—to this Court on the rehearing.

1. The Flood was "a great flood" which "began suddenly in July, 1926" (Report of the President of the Commission, R. 31). It was an extraordinary and apparently

unprecedented flood; "although there were some floods in El Anegado of Lajas prior to 1926, the same were not of the extent as the one now in question and that the same lasted only a few months" (Opinion of the Supreme Court of Puerto Rico, R. 74). And, as the opinion of the Circuit Court of Appeals said (R. 90) this flood was "at a higher level than was customary following even unusual seasonal rains."

The volume of the flood water was enormous. As estimated by the President of the Commission in May, 1928 (R. 31) the flood covered at the Anegado from four to five thousand acres—that is from 6¼ to 7 8/10 square miles—and it was estimated on July 1, 1928 that in order to reduce this flood it would be necessary to draw off 3.62 feet of water both from the Anegado region and from Guanica Lake (R. 44). On this basis, we estimate that the excess flood waters at the Anegado then amounted to upwards of 4,718,001,000 gallons, estimated on the lower figure, four thousand acres; if five thousand acres were flooded, the flood waters would be proportionately greater.

As nearly as we can estimate from the map submitted herewith ("Outline Map of Puerto Rico, published by the War Department, Adjutant-General's Office, Military Information Division, 1899") of which we believe this court will take judicial notice, the superficial area of the Lake of Guanica at its ordinary level is about three square miles, so that 3.62 feet of excess flood waters over this area on July 1, 1928 would amount to 2,264,640,491 gallons. Thus the aggregate of the excess flood waters at the Anegado and in Guanica Lake would be upwards of 6,982,641,500 gallons,—or 3.62 FEET OF WATER OVER MORE THAN TEN SQUARE MILES!—

And the flood was all the time fed by exceptionally heavy rains, and by the cyclone of San Felipe on September 13, 1928 (R. 31).

In the face of this enormous and unprecedented flood there could be no question of the "customary level thereof during the rainy season as it exists in years of average and usual rainfall", as specified in the franchise. The years in question were obviously not years of average and usual rainfall.

2. THE FLOODED AREA is designated throughout the record as "El Anegado". This means, as stated in the record (p. 31) and in the dictionaries, the "overflowed region". Its name is the best possible proof of the character of the Anegado and of the fact that it is often flooded. Its chief characteristic, known to the population and geographers, is that it is an area often flooded. This is confirmed by the official map of *1899,* now submitted, which shows El Anegado, under that name, as being a definite territory, indicated as swamp land, about five miles long and half a mile, more or less, wide, connected with Guanica Lake by a channel.

3. THE "OUTLET" OF THE LAKE, THE CAÑO NEGRO, is far from being what the word "outlet" would indicate to those familiar with northern lakes, but its character and adequacy—or inadequacy—for the reduction of this extraordinary flood are most important.

Guanica Lake is, as the map submitted herewith indicates, like many tropical lakes and lagoons, merely a collection of inflowing waters, mostly seasonal rainfall. The level of such lakes is generally kept down by evaporation

and seepage and not by outflow, their beds are from time to time practically dry, and they have no regular or important outflow. For such lakes the "outlet" is of little importance, except in the sense that it is that part of the shore which is somewhat lower. That this is true of Lake Guanica is indicated by the map; it shows many streams flowing into the lake and the connected Anegado and only a small, crooked Caño Negro from the lake to the sea.

The name "Caño" shows the character of the "outlet". The word "Caño" is not used in ordinary speech to designate any kind of a stream; the Velasquez Dictionary of the Spanish and English Languages (1904) defines it as follows:

> "1. Tube, pipe or cylinder of wood, glass or metal; 2. Common sewer, gutter; 3. Spring, spout or conduit for spring water; 4. Cellar or other place for cooling water; 5. (Obs.) Mine; 6. (Obs.) Subterranean passage; 7. (Prov.) Warren or burrow • • •; 8. Channel which forms at the entrance to seaports."

Apparently it has no legal connotation; it is not defined in the standard Spanish Law Dictionary of Joaquin Escriche (Diccionario Razonado de Legislacion y Jurisprudencia, Paris, 1896 and the Supplement, 1901). It is not found in the chapter on waters in the Civil Code of Puerto Rico (Secs. 341 to 359) where various kinds of streams and channels are mentioned, nor so far as we have found, does it appear in the long and detailed Law of Waters of Puerto Rico, coming down from Spanish times (Compilation of the Revised Statutes and Codes of Porto Rico in force March 9, 1911, pages 457 to 494). "Caño" obviously does not mean a stream, but only a ditch or narrow channel.

This is indicated also from the nature of the "interruption" to the Caño. The President of the Commission (R. 33) states that this outlet (referring to the Caño Negro, mistranslated as "Pond") "was absolutely interrupted for about three hundred meters close to the Lake and that at this distance the bed of the old pond could be seen but that for about three hundred meters close to the lagoon, as has been already said, the land was absolutely flat and no one could notice in that place that there had ever been a pond there." There is no question here of a barrier thrown up artificially or by wind and waves across a real outlet, like the active outlet of a northern lake; there is no question here of a real, adequate outlet filled in level for a distance of three hundred meters from the lake—a work which would be extremely difficult and expensive and which would show on the surface of the plain. The thing indicated by the President's statement is, we submit, that part of a narrow channel or ditch, seldom used, had disappeared.

The character of the Caño and its adequacy, even with all obstructions removed, to reduce this enormous flood quickly are important, for the "default" charged against the respondents is apparently that they failed to remove this three hundred meter interruption to this little Caño or ditch!

There is in the record absolutely nothing to show that this Caño, with the interruption removed, could handle this great flood and there is no basis for any presumption. The fact that there was adequate "fall" or difference of level between the shore of the Lake and the sea (R. 43, 44), shows that in an engineering sense it is *possible* to construct a drainage channel of adequate size to drain this flood in some period of time— but it shows nothing more.

This fact in no way justifies the conclusion that the removal of the interruption in the Caño-ditch would either prevent or drain the flood.

In the record of the hearings before the Public Service Commission, there appears as Exhibit 2, introduced and marked in evidence, without objection on the part of the Commission, on February 19, 1929, a map entitled "Russell & Co. Suers. S. en C. Map showing conditions in the vicinity of the outlet to Guánica Lake Dec. 22 to Dec. 30, 1928. Scale 1" to 200 ft. Ensenada, P. R. Dec. 30, 1928. H. V. Latham. Surveyed by C. B. Reed and A. L. Land. Drawn by C. B. Reed." We respectfully ask leave of the court to submit, either for consideration with this petition or upon rehearing, a blue-print of this map, provided counsel for the petitioner will consent. We believe that this blue-print will much clarify the situation because it purports to show the length, depth and location of the Caño at the time and the level of that part of the lake. With this blue-print may be submitted, if desired, an authenticated copy of all of the evidence concerning the map.

The failure of the respondents to dig out this three hundred meter interruption of this Caño,—if there was such a failure on their part—can not be considered to be a "breach of condition" of the franchise justifying its forfeiture, particularly as it was not shown and cannot be presumed that the removal of this obstruction, if any, could have had any important effect on the level of the water.

4. THE RESPONDENTS TOOK STEPS TO GET THE FLOOD WATERS DOWN.

Protesting that they had no obligation to do so, the respondents did take "steps to lower the height of the waters

of Guanica Lake to its customary level and to guarantee that in the future the waters will not go beyond the customary level'' and ''has paid all expenses of said works out of its own money'' (R. 26, not denied).

And these efforts were apparently effective. The report of the President of the Commission (R. 31) states that although in or around May, 1928, the flood ''covered an area which varied between four and five thousand acres of land'', nevertheless, in January, 1929, the estimated area of the land then flooded was two thousand acres and the President added, ''It is true that in the meantime we had the cyclone of San Felipe of September 13, 1928 and that there was an extraordinary rainy season.''

This was certainly a notable change; the area of the flooded land had diminished over fifty per cent.; and judging as best we can from the area of El Anegado shown on the map submitted herewith, the flooded land in January, 1929, was not much greater than the usual area of El Anegado, the flooded territory.

5. THE FLOOD AND CRISIS WERE PROBABLY OVER BY THE SUMMER OF 1929.

Judging from the reduction in the flood above shown, this seems probable. The President's report was dated March 7, 1929, and the cancellation order was made thereupon on March 8, 1929, showing that the record of testimony before the Commission was completed before that date. Naturally, the course of the flood after March 8, 1929 would not appear in the record. But it is important to the respondents that this court, before approving finally and irrevocably the forfeiture of their franchise, should know the result of the respondents' efforts and the facts as to the continuance or disappearance of the crisis.

We accordingly respectfully ask leave of the court to submit, either for consideration with this petition or upon rehearing, the facts as to the monthly rainfall and level of the waters in Lake Guanica each month from March 8, 1929 down to the present date, so far as the counsel for peitioner will consent; the records of rainfall and water level are so carefully kept by the respondents that we believe we can satisfy our adversary of the accuracy of the figures to be presented.

6. THE RESPONDENT'S CONDUCT, WE SUBMIT, HAS BEEN PRAISEWORTHY AND NOT BLAMEWORTHY.

They have throughout acted as "good neighbors", offering to give other lands in exchange for flooded lands for the reason "that as the lands of their neighbors were flooded they did not want the latter to suffer any damages" (R. 34); and, as was said by the Supreme Court of Puerto Rico (R. 68), "owing to the damages suffered by landowners, the holder of the franchise has granted the usufruct of certain properties to the landowners whose properties have been flooded." Thus, although they had not caused damage to abutting owners by "unduly raising the level of the waters of said lake or by unduly lowering the level of the waters of said lake", to use the language of Section IV of the franchise (R. 9), and have thus not become liable to the abutting owners for damages from the flood, they have, as a matter of fact, compensated landowners for flood damage.

The respondents were in no respect recalcitrant to the orders of the Commission; they have disregarded no order. The sketchy record does not show what action was taken by the respondents as a result of the interlocutory order of

the Commission (R. 43), but the President's report (R. 31) indicates that soon after the interlocutory order, representatives of the respondents were making estimates for or with him as to the flooded region.

Again, in the matter of fixing the "customary level" of the waters during the rainy season, we submit that no blame can attach to the respondents. It appears from the President's report (R. 33) "that at no time the Government or its representatives fixed the level at which the waters of this lake should have been kept"; it is said that the franchise-holders did not submit any data or report regarding the level, but it is nowhere indicated that they were requested so to do. And so far as concerns the present flood or the forfeiture of respondents' franchise, the fixing of the customary level was quite immaterial and unimportant. The extraordinary flood certainly exceeded the level and the situation would not have been different if the customary level had been fixed.

IN VIEW OF THE SITUATION AND CIRCUMSTANCES, CAN IT BE SAID THAT THE RESPONDENTS HAVE BEEN GUILTY OF ANY NEGLECT JUSTIFYING THE EXTREME PENALTY OF FORFEITURE?

It is true that the Commission and the courts below have charged the respondents with neglect. For that reason and because of the lurid pictures of the flood, it is not strange that this Court, in the absence of any argument on the question of reasonableness, should have made the decision which it did.

But we ask the Court to reconsider. We submit that the petitioner has not proved or attempted to prove that the

respondents have not done all that could reasonably be done under the circumstances for the reduction of this unprecedented flood. It has not shown or attempted to show what feasible and reasonable steps for such protection the respondents have failed to take.

The Commission and the courts below have, we submit, been satisfied to infer neglect from the fact of the long continued flood and the respondents' control (nothing more than by land ownership) of the puny outlet. They have been shocked by the flood and have been, naturally, anxious to find a culprit, but they have really charged the respondents with neglect merely upon the *presumption* that the respondents could have done more than they did to remedy the situation and on the general idea that because of the franchise or the outlet control they were *bound* to control the flood. The Commission apparently adopted the President's statement (R. 34) of the fundamental reason for cancelling the franchise:

> "We shall *presume,* of course, that if the pond that served as an outlet to the lake is situated on lands controlled by the respondents, and that this pond has been completely dried out or eliminated, the respondents are responsible of the consequences, *unless they prove to us the contrary in a conclusive manner.* But we shall *presume* (fol. 37) that this situation could not have been created without their consent or knowledge." (Italics ours.)

We respectfully urge that the facts do not justify the extreme penalty of forfeiture, that that penalty is excessive and therefore capricious and arbitrary rather than reasonable.

TWO: We have tried to show above that even if the respondents were in some sense in "default," the extreme penalty of forfeiture is, under the circumstances, excessive and hence not reasonable but capricious and arbitrary.

Further, we urge again—as we have consistently contended throughout the litigation—that the franchise, properly construed, imposes no positive obligation to keep down extraordinary flood waters and that the respondents are in no default whatever under the franchise and chargeable with no breach of condition.

The language of this court in the next to the last sentence of its opinion shows that this court has, without hearing the respondents on the point, held the order of cancellation valid and reasonable because of "the extended period of the holder's default, the character of the resulting damages and the Commission's authority to terminate for breach of condition on which the grant was made." We submit with confidence that no basis in the record can be found for the conclusion that the respondents were in default under the franchise or that any damages resulted from any such default, or that there was any breach of condition.

That the franchise did not impose on the franchise-holders any positive duty to reduce extraordinary flood waters is so clear it is hard to argue. There is little to argue against.

The franchise simply *does not* impose such a duty; the words do not and cannot carry such a meaning. We can only ask the Court to read the first four sections of the franchise, which concern water (R. 8 and 9) and particu-

larly Sections I and IV, which we quote below. The capitals are ours:

> "I. That the Guanica Land Company (a corporation organized and existing under and by virtue of the laws of the State of New Jersey), and its successors and assigns, be and they are hereby AUTHORIZED AND EMPOWERED to erect, construct, maintain and operate a dam of masonry work or other proper materials across the Cano Negro, or outlet from the Lake of Guanica, in the Municipality of Yauco and upon such lands of abutting owners AS MAY HAVE BEEN ACQUIRED BY CONSENT OR BY PROCESS OF LAW, for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said Lake, through the said Cano or otherwise, for the purposes hereinafter set forth."
>
> "IV. That NOTHING HEREIN CONTAINED SHALL BE HELD OR CONSTRUED TO AUTHORIZE OR PERMIT THE SAID COMPANY OR ITS SUCCESSORS OR ASSIGNS TO RAISE OR MAINTAIN the level of the waters of said Lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said Lake, or by unduly lowering the level of the waters of said Lake, shall be borne by the said Company, its successors and assigns and action for damages shall lie against said Company, its successors and assigns for such damage by such abutting owners, in any court of competent jurisdiction."

A reading of Sections I and IV makes it perfectly clear:

That Section I merely gives *authority* and *power* and does not and cannot be supposed to impose any *duty;*

That even the authority and power are only to construct a dam upon lands "acquired by consent or by process of law", without any duty to acquire those lands;

That the authority and power are only for erecting, maintaining and operating a dam, and that *except by the construction and operation of a dam* Section I gives no power or authority whatever to retain, store or conserve the waters or to restrain and regulate the flow of water from the Lake;

That—except by a dam which has never been erected—the franchise gives no right or power (much less imposes any duty) to drain flood waters at this public lake or to raise or lower the water or to construct or use any drainage works or to do anything whatever affecting the water level except by drawing irrigation water;

That Section IV merely gives warning that the franchise does not *"authorize or permit"* the franchise-holders to raise or maintain the water level above the customary level, etc.; and that if the franchise-holders themselves by their positive act should "unduly" raise or lower the level the damages to abutting owners shall be borne by the franchise-holders and that actions for such damages shall lie;

That the first sentence of Section IV about raising the level is, in effect, a footnote to Section I regarding the dam, making it clear that the authority and power to erect and maintain a dam under Section I does not give to the franchise-holders *authority or permission* to raise by their positive act the water level above the customary level; and that this limitation upon Section I *absolutely cannot* be read as imposing on the franchise-holders the affirmative duty (in the absence of any dam) to lower the level when raised by floods and not by any positive act on their part;

That in the absence of a dam *the franchise gave no control of the outlet or of the lands at the outlet;*

That the damage provision in Section IV is limited to damages resulting from the positive acts of the franchise-holders in unduly raising or lowering the water level; if the franchise imposed any affirmative duty to lower flood waters, this careful provision about damage would certainly have been extended to damages resulting from failure to perform that affirmative duty.

In short, the words used in this important franchise, carefully drafted in English and signed by the President of the Executive Council and the Governor, simply cannot, even by torture, be made to mean that a positive duty to keep the water level down (in the absence of a dam) was imposed on the franchise-holders.

THREE: The "public interest" in this case does not justify—but rather forbids—the imposition of the extreme penalty of forfeiture.

The general rule was stated by Mr. Justice Brewer in *Henderson* v. *Carbondale Coal & Coke Co.* 140 U. S. 25, 33:

> "Forfeitures are never favored. Equity always leans against them and only decrees in their favor when there is full, clear and strict proof of a legal right thereto."

There are exceptional cases, such as those cited in Mr. Justice Butler's opinion (*Kern River Co.* v. *United States,* 257 U. S. 147, 155; *Farnsworth* v. *Minn. & Pac. R. R. Co.,* 92 U. S. 49, 68; *Union Land & Stock Co.* v. *United States,*

257 Fed. 635, 637) which say that forfeiture, although usually disapproved, may be justified where the public interest is concerned. In such cases the public interest is generally a railroad, as in the *Farnsworth* case, or some other form of public service, or the construction of works, like irrigation works (as in the *Kern River Co.* case and the *Union Land & Stock Co.* case) in which the public is interested; if such railroad is not built or such public service given or such works constructed, by the franchise-holder, a forfeiture of the franchise may open the way for a new franchise and a better service of the public. The *Farnsworth* decision (p. 68) states the exception to the general rule as follows:

> "But there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law."

But here the public interest is quite different. It is to get the highways cleared and the fields freed of water; it is served by measures which will get the flood waters down and not by those which would punish the respondents and cripple a great local enterprise of value to the community —and which would stop the pumping of a maximum of 20,000,000 gallons of water daily and which would thus increase rather than diminish the danger of injurious floods!

The order of cancellation by the Public Service Commission (R. 27, 28) and the Report of the President on which it was based (R. 28 to 35) show clearly that the Commission did not feel that the total and final forfeiture of the franchise was in the public interest, but only the substitution of

a modified franchise which would fix "the highest level at which they agreed to keep the waters as well as the plan of the works that they intend to carry out in order that said level be permanently kept" (R. 35).

We submit that the public interest and requirements of justice are fairly and fully served by amendment of the franchise as suggested by the Circuit Court of Appeals after full hearing and consideration of the question of "reasonableness", and that forfeiture, on the other hand, is not only unnecessary and contrary to the public interest, but oppressive and unreasonable and calculated to deprive the respondents of their property without due process of law. That Court said (R. 92):

> "Under the circumstances disclosed by the record, the absolute cancellation of that part of the franchise pertaining to the use of the waters of the lake would, in our opinion, be an arbitrary and unreasonable act, if it involved, as it may have, a taking of a valuable property right acquired by the appellants under the franchise, viz.: the right to take 20,000,000 gallons of water daily from Guanica Lake."

Again (R. 93):

> "* * * we nevertheless think a proper procedure in this case will be to reverse the judgment of the Supreme Court. The Commission may then proceed upon the evidence before it, and upon further investigation, establish a reasonable limitation upon the height at which the waters of the lake may (fol. 104) be maintained, and amend the franchise of the appellants, so as to restrict their right to hold the waters back under normal conditions at a higher level than the height so fixed. From the record in this case it is

apparent that the appellants and the Commission will be able to agree on a definite level to accomplish this purpose."

WHEREFORE, your petitioners pray for a hearing herein upon the question of the reasonableness of the order of cancellation and for such other and further relief as may seem proper.

AND your petitioners will ever pray, etc.

H ACE HAVEMEYER, *et al.* (RUSSELL & COMPANY, SUCRS. S. EN C.),
Respondents-Petitioners,

By: RALPH S. ROUNDS,
Attorney for Respondents-Petitioners.

I hereby certify that the foregoing petition is presented in good faith and not for delay; and that in my opinion the relief therein prayed should be granted.

RALPH S. ROUNDS,
Of Counsel.

Appendix.

POINT II.

In permitting himself to discuss the question whether the order was on the record, actually unreasonable (Petitioner's Brief, pp. 26-28) our adversary has ignored the rule that on review in *certiorari* "the only question for consideration is that stated in the petition for the writ of *certiorari.*"

This rule was so stated in *Helvering* v. *Taylor,* 293 U. S. 507, 511.

See, to the same effect, *Clark* v. *Williard,* 294 U. S. 211, 216; *Zellerbach Company* v. *Helvering,* 293 U. S. 172, 182; *Gunning* v. *Cooley,* 281 U. S. 90, 98; *Davis* v. *Currie,* 266 U. S. 182; *Webster Company* v. *Splitdorf Company,* 264 U. S. 463.

The writ of certiorari was here sought on the ground that there is no "controversy" which the Circuit Court of Appeals had jurisdiction to decide—not on the ground that the Court erred in deciding that the order should be reversed because arbitrary and unreasonable. In stating (Petition, p. 20) its "reasons for granting the writ" the petitioner makes clear that the writ is not sought to review a mistake of the Circuit Court of Appeals as to reasonableness but only to determine definitely the "scope of the judicial powers of the United States and of the power of a constitutional court of the United States to review the action of the public service commission" etc. The petitioner's statement of "questions presented" (Petition, p. 2, repeated by reference at petitioner's brief, p. 22) is to the same effect, with the additional mention of parties.

> "The principal question here involves the scope of the 'judicial power of the United States' under Article III of the Constitution.

Does the judicial power extend to the review by a constitutional court of the United States of the 'reasonableness' of an order of a public service commission repealing a public utility franchise in accordance with a clause in the original franchise accepted by the grantee expressly reserving the power to repeal it, inserted in the franchise pursuant to a requirement of an Act of Congress?

Another question is whether the six individual respondents here,—the appellants in the Circuit Court of Appeals,—are parties in interest entitled to maintain an appeal from the order of the Public Service Commission of Puerto Rico, and particularly to maintain an appeal from the insular Supreme Court to the Circuit Court of Appeals, in the absence of the corporate entity, the *Sociedad en Comandita,* Russell & Co., Sucrs. S. en C., which alone appears to claim any title to the franchise involved."

We believe that we have shown above that the Circuit Court of Appeals *within its jurisdiction* decided that the Supreme Court of Puerto Rico erred in holding that the order was to be upheld as being reasonable; in its opinion (R. 92) the Circuit Court of Appeals clearly stated its decision on that point. As to reasonableness this decision was for all purposes of this review conclusive. See the last part of the quotation from *Cami* v. *Central Victoria, Ltd.*, 268 U. S. 469, set forth at page 45 below.

SUPREME COURT OF THE UNITED STATES.

No. 115.—October Term, 1935.

The Public Service Commission of Puerto Rico, Petitioner, *vs.* Horace Havemeyer et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 6, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

March 19, 1901, the executive council of Puerto Rico granted to the Guanica Land Company, a New Jersey corporation, assignable franchises including the privilege to take water from Guanica Lake for the irrigation of the company's lands. Russell & Company, Sucesores, Sociedad en Comandita, a limited civil agricultural partnership composed of Havemeyer and the other respondents as partners, succeeded to that privilege. March 8, 1929, the public service commission of Puerto Rico made an order canceling it. The district court of San Juan and the supreme court successively sustained the order. Respondents' final appeal was to the Circuit Court of Appeals; it held the order unreasonable, reversed the judgment of the supreme court and remanded the case for further proceedings. 74 F. (2d) 637.

Notwithstanding absence of cross petition, we may consider respondents' insistence that the commission was without authority to make the order. *Langnes* v. *Green*, 282 U. S. 531, 536-538. The petition presents two questions: Whether the Circuit Court of Appeals, a constitutional court of the United States, has jurisdiction to review the commission's order; whether the six individual respondents here are parties in interest entitled to appeal. There is another question adequately raised by the petition though not specified formally as are the others or presented in accordance with the best practice. It is whether the Circuit Court of Appeals erred in holding the order to be unreasonable and in reversing upon that ground the judgment of the supreme court.

The Organic Act of 1900, c. 191, 31 Stat. 77, authorized the creation of an executive council, § 18, and provided: "That all grants

of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same". § 32. The Joint Resolution of May 1, 1900, § 3, 31 Stat. 716, required that all such grants "shall provide that the same shall be subject to amendment, alteration, or repeal".

The franchise, in addition to conferring the privilege of using the water of Guanica Lake for irrigation of their lands, authorized the grantees to construct a wharf in, and to build and operate a railroad along, the harbor of Guanica bay into which flow the waters of the lake. The irrigation privilege is the only one here involved; its substance follows: The grant was for 99 years and extended to the land company, its successors and assigns. They were authorized to construct and operate a dam across the outlet for the purpose of regulating the flow of the water from the lake. They were given the right to take up to 20,000,000 gallons a day from the outlet or elsewhere, by gravity, through channels or by pumps, and to construct and operate works therefor. The franchise declared that nothing therein should be construed to permit grantees to raise or maintain the height of the lake above its customary level during the rainy season in years of average and usual rainfall, and they were declared liable for all damage sustained by abutting owners by reason of unduly raising the waters. They were authorized to acquire by eminent domain private lands needed for their works, and were required to have plans for the same approved by the commissioner of the interior before commencing work. They were required to pay $300 per year for the irrigation privilege, and in case of default the commissioner might stop the flow of the water. It was provided "that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal".

The Second Organic Act, approved March 2, 1917, c. 145, 39 Stat. 951, declares the authority of the legislature shall extend "to all matters of a legislative character not locally inapplicable", § 37, but expressly reserves to Congress the power to annul acts of the legislature. § 34. The Act also creates a public service commission and declares that all grants of franchises, rights, and privileges of a public or quasi-public nature shall be made by it but not

to be effective until approved by the governor and to be subject to the power of Congress "to annul or modify the same". § 38. It requires such grants to provide that they shall be subject to amendment, alteration or repeal. § 39. Section 38 was by § 6, Act of March 4, 1927, amended to empower and direct the commission to discharge such additional duties and functions as might be conferred upon it by the legislature. 44 Stat. 1420.

The Laws of Puerto Rico, 1917, Act No. 70, requires that all grants of franchises shall be subject to amendment, alteration or repeal by the commission (§ 54), and declares that it shall have power to alter, amend, modify or repeal any franchise that may have been granted by the executive council and shall exercise all the rights and powers reserved to the executive council by any such franchise or privilege or by any law. § 60.

Act No. 70 also regulates the commission's procedure and the appeals from its orders. The testimony before the commission must be taken down. § 68. Any party to the proceedings thereby affected may appeal from its orders to the district court of San Juan. Petitions for appeals include assignments of errors. § 78. The commission is brought in as party defendant; upon the filing of its answer, the case is at issue. The commission is required to certify to the court its proceedings including the testimony, findings, opinions and orders. §§ 79-82. No evidence may be taken on appeal. § 86. The court is required to determine whether the order appealed from is reasonable and in accordance with law. § 83. If found to be so, the court must dismiss the appeal and affirm the order. If found unreasonable or based upon incompetent evidence or otherwise not in conformity with law, the court must reverse the order or remand to the commission. § 85. A party aggrieved by the final judgment of the district court may appeal to the supreme court in the same manner and form as in other cases. § 90. Appeal from the judgment of that court is to the Circuit Court of Appeals for the First Circuit. Judicial Code, § 128 (a) (Fourth). 28 U. S. C., § 225 (a) (Fourth). The attorney general is required, upon request of the commission, to proceed by mandamus, injunction or quo warranto to enforce the commission's orders. § 94.

February 24, 1928, the municipality of Lajas complained to the commission and to the commissioner of the interior that the works of the holders of the irrigation privilege were causing irreparable

damage by raising waters of the lake above the levels specified in the franchise and thereby flooding privately owned lands and public roads. The commissioner investigated and to the governor reported: Apparently the situation was created by violation of the provisions of the franchise. The holders failed to submit plans as required. The customary levels of the lake mentioned in the franchise have not been determined. The company has borne none of the damages. There was sufficient cause to request the commission to consider repealing the franchise. The governor referred the report to the commission. It called on the parties interested to show cause why it should not totally cancel the franchise.

The South Porto Rico Sugar Company, interested in other privileges, and Russell & Company, holder of the irrigation privilege, appeared specially and objected to the jurisdiction of the commission. Before answering the rule to show cause, they brought a suit in the United States Court for Puerto Rico to enjoin the commission from asserting any jurisdiction over them in respect of the franchise. The court dismissed the bill on the grounds that the suit was premature and that the commission had jurisdiction. The Circuit Court of Appeals affirmed. *South Porto Rico Sugar Company* v. *Munoz,* 28 F. (2d) 820.

Russell & Company, by its answer to the order to show cause, admits that the water of the lake has been higher than the usual level and has flooded some lands, asserts that it was not raised by the fault of any owners of the franchise, alleges that the holders have spent large sums for works for the taking of water and that cancelation would cause it great loss, maintains that the commission has no jurisdiction over it and says that, although the partnership had no obligation so to do, it has (since the order to show cause) at its own expense taken steps to lower the waters of the lake to, and also to guarantee that in the future they will not go beyond, customary levels.

Shortly after this answer was interposed, the commission, upon consideration of conditions then existing in and near the flooded area, found partial drainage to be immediately feasible and, by an interlocutory order, called on the holders of the irrigation privilege to prepare a draft of works to lower the level of the lake in order to relieve the overflowed district. The record before us discloses no response or action by the holders.

There was a hearing upon the issues raised by the order to show cause and the answers filed by interested parties. Russell & Company appeared and was heard; much evidence was received. The commission canceled the franchise but only in respect of the irrigation privilege. The report made by the president of the commission shows: The holders of the irrigation privilege controlled the lands through which the water had been accustomed to flow from the lake to the bay. They allowed to accumulate in the outlet soil and debris, for a distance of 100 yards or more, which held back the waters and caused overflow on an opposite side of the lake. From about the middle of 1926 until late in 1928 the waters so raised continued to flood thousands of acres including entire farms and seven or eight kilometers of public roads in the Lajas Valley and so caused damage to private owners and to the community in general.

The district court deemed itself required to decide only whether the order was reasonable and in accordance with law. There was no claim that it rested on incompetent evidence. Upon the record of proceedings, including the evidence introduced before the commission, it held: Under the franchise the holders of the irrigation privilege assumed control of the flow from the lake through the outlet to the bay and had power to raise or lower the level of the waters. They failed to comply with the duty—voluntarily contracted by them in accepting the franchise—to submit plans of their works to the commissioner for approval. From July, 1926, appellants caused or permitted an excess of water to be held in the lake raising it to heights above the customary levels in years of average rainfall and thereby flooded thousands of acres and caused injury to land owners and to the community in general. The order is reasonable and agreeable to law. The court gave judgment dismissing the appeal and affirming the order.

Respondents took the case upon the same record to the supreme court. It construed the franchise not only to prohibit grantees from causing the water to be raised above the indicated levels but also to require them to prevent its exceeding such levels and to that end imposed upon them the duty to keep the outlet open. It held that, "inasmuch as appellant has failed to comply with the conditions of the franchise", the commission's order was reasonable and in accordance with law and affirmed the judgment of the district court.

On the appeal to the Circuit Court of Appeals, the evidence was omitted from the record. That court, assuming that it was sufficient to support a finding that the holders of the irrigation privilege knowingly permitted obstruction in the outlet to raise the level of the lake, concluded that the order canceling the privilege was "an arbitrary and unreasonable act" and reversed the judgment.

1. First to be considered is respondents' insistence that the commission was not authorized to cancel the irrigation privilege.

That contention has been overruled by both insular courts and the Circuit Court of Appeals on the authority of *South Porto Rico Sugar Co.* v. *Munoz, supra.* While, as to the privilege in question, the original grantee or subsequent holders are not public utilities, the franchise is one of a quasi-public nature. The holders' right to take the waters depended upon a grant from the public. Civil Code of Puerto Rico, §§ 341, 343, 344. They were endowed with power of eminent domain to acquire *in invitum* lands of others to enable them conveniently to irrigate their lands and effectively to discharge the duties imposed upon them by the franchise. The terms of the grant were a matter of general concern inasmuch as the use of lands, condition of roads and health of people in the vicinity were liable to be adversely affected if the holders of the privilege should permit the waters to overflow contiguous areas.

Implied in every grant of franchise is the condition that it may be lost by misuse. Every such special privilege is subject to termination for breach of condition, whether express or implied, upon which the grant depends. It may be canceled or withdrawn by any procedure that is not repugnant to the established principles of justice. The initial step need not be a suit for mandamus, *quo warranto,* injunction or the like. Essential requirements are satisfied if the withdrawal of the privilege, declared by legislative or executive authority, may be followed by appeal to a court of competent jurisdiction in which the rights of the holders may be determined. *N. Y. Electric Lines* v. *Empire City Subway,* 235 U. S. 179, 194. *Cosmopolitan Club* v. *Virginia,* 208 U. S. 378, 383. *New Orleans Waterworks Co.* v. *Louisiana,* 185 U. S. 336, 346. *Eagle Insurance Company* v. *Ohio,* 153 U. S. 446, 454. *Chicago Life Ins. Co.* v. *Needles,* 113 U. S. 574, 580. *Terrett* v. *Taylor,* 9 Cranch 43, 51.

The assertion by Congress of power to "annul and modify" franchises granted by the commission and to annul laws enacted

by the insular legislature gives rise to no implication that the reserved power was intended to be withheld from insular authorities. Inference to the contrary is a more reasonable one and in harmony with the reasons which underlie the reservation. Local authorities may ascertain facts and decide questions upon which depends appropriate exertion of the power much more conveniently than may the Congress.

Under the Organic Acts and insular laws the power of the commission to make the order in question is clear. And that is so whether the cancelation was accomplished by exertion of the power to amend, alter and repeal expressly reserved or was effected under the implied rule that such franchises are terminable for breach of condition. Congress has not directly empowered the commission or any other insular authority to exert the reserved power. But it has adequately empowered the insular legislature and created a public service commission in which it vested the functions in respect of franchises that theretofore had been discharged by the executive council. The insular legislature by enactment, obviously not locally inapplicable, empowered the commission to alter, amend, modify or repeal any franchise granted by the executive council. § 60, Act No. 70 of 1917. That authorization unquestionably extends to the cancelation of the irrigation privilege.

2. Petitioner maintains that the judicial power of the United States does not extend to the review of reasonableness of the commission's order, and that therefore the Circuit Court of Appeals was without jurisdiction of the appeal. It assumes that the making of the order was merely the exertion of the power to repeal that is expressly reserved in the grant. It says that here involved is a question of the kind of reasonableness of a purely executive decision to exercise a contractual right of the government, and that it is a wholly different kind of question of reasonableness from that involved in the exercise of a power to cancel a franchise where may arise a judicial question whether executive action is confiscatory. And on that basis the commission insists that the repeal involved nothing but the exercise of executive discretion and is therefore not subject to review of the courts.

The reserved power to repeal a grant of special privileges implies that it may be exerted at the pleasure of the legislature or other authority in which the power to repeal is vested. *Tomlinson* v. *Jessup*, 15 Wall. 454, 459. *Miller* v. *The State*, 15 Wall. 478, 498.

Railroad Co. v. *Georgia*, 98 U. S. 359, 365. *Sinking-Fund Cases*, 99 U. S. 700, 720. *Greenwood* v. *Freight Co.*, 105 U. S. 13, 17. *Calder* v. *Michigan*, 218 U. S. 591, 599. Cf. *Grand Trunk Western Ry.* v. *South Bend*, 227 U. S. 544. That power is plainly distinguishable from the power to cancel for violation of the terms of the grant. In the absence of constitutional, legislative or contractual restriction, the exertion of the first mentioned power requires nothing more than an appropriate declaration of the repeal. *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 270-271. But, without consent of the holder, valid cancelation for condition broken cannot be accomplished without giving to the holder an opportunity to have the asserted default judicially determined. *N. Y. Electric Lines* v. *Empire City Subway, supra*, p. 195. *Farnsworth* v. *Minn. & Pac. R. R. Co.*, 92 U. S. 49, 66. *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413, 430-434. *New York Indians* v. *United States*, 170 U. S. 1, 24.

We need not consider whether the expressly reserved power of repeal is trammeled by Act No. 70 or other law governing the commission or the appeals from its orders, for there is above disclosed enough of the proceedings and determinations of the commission and of the lower courts to show that the order in question was not the exertion of the expressly reserved power to repeal but was the assertion of the implied right to cancel for failure of holders to perform their undertakings. On the appeal the district court was not authorized to substitute for those of the commission its own views as to what action would be just or ought to be taken, or to perform any legislative, executive or administrative function. Its only jurisdiction was to decide upon the record certified to it by the commission whether the order was (1) reasonable, (2) in conformity with the law, (3) based upon incompetent evidence. "Reasonable" as here employed means not "capricious", "arbitrary" or "confiscatory". Whether the order of cancelation was reasonable in the sense that it did not transgress permissible limits is a question of law. It is not suggested that the other questions presented on the appeal were not within the jurisdiction of the court. The permissible scope of the determinations and judgment of the court is significant. It may only decide the questions of law raised by the appeal and affirm or reverse the order or remand the record to the commission for further action. It is without authority to amend or modify an order of the commission. The

jurisdiction and duties of the supreme court and Circuit Court of Appeals are similar in all respects to those of the district court. Neither has any power or function other than what is strictly judicial. It is clear that the Circuit Court of Appeals had jurisdiction of the appeal taken to it. *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 200. *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266. Cf. *Keller* v. *Potomac Elec. Co.*, 261 U. S. 428, 444. *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468. *Radio Comm.* v. *General Electric Co.*, 281 U. S. 464, 469.

3. The second question specified in the petition for the writ is whether the six individuals named as partners, constituting Russell & Company, are parties in interest entitled to appeal from the order. The question as put requires clarification by reference to the facts on which it is based. Havemeyer and the other persons named constitute a limited partnership, Russell & Company. Its answer to the order to show cause is in this form:

"Now comes Russell & Company, Sucrs., S. en C., a civil agricultural partnership organized in accordance with the laws of Puerto Rico, composed of Horace Havemeyer, Frank A. Dillingham, Frank M. Welty, Edwin L. Arnold and H. B. Orde, as partners . . ."

The petition for appeal to the district court begins:

"Now come Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, members of the civil agricultural partnership of Puerto Rico, Russell & Co., Sucrs., S. en C., and hereby appeal . . ."

With immaterial variations in the use of words, the designation of appellants last given was followed in the petitions for appeals to the supreme court and the Circuit Court of Appeals. And so in substance were the appealing parties referred to in the opinions, judgments and generally throughout the litigation. Petitioner's point comes to this. The partnership, Russell & Company, composed of the persons named as partners, claiming to be the owner of the irrigation privilege answered the order to show cause; but the appeal from the order of cancelation was taken by these persons as partners constituting the partnership. The commission first raised the point in the Circuit Court of Appeals. If worthy of notice, it should have been made when the appeal was taken to the district court. The appeal is in the nature of a suit to have the order adjudged invalid. The petition for appeal is the complaint.

The commission answered on the merits. Thereby it admitted respondents' capacity to initiate the proceeding. *B. & P. Railroad* v. *Fifth Baptist Church*, 137 U. S. 568, 572. *The Society for the Propagation* v. *The Town of Pawlet*, 4 Pet. 481, 501. *Conard* v. *The Atlantic Insurance Company*, 1 Pet. 386, 450. Havemeyer and the other partners here maintain that, by the proceedings above described, the partnership itself, a juridical entity (*Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 482) in legal effect did take all the appeals and was before the Circuit Court of Appeals. It results that the commission's suggestion that the partnership will not be bound by the judgment is without merit. The Circuit Court of Appeals rightly held that the partnership appealed and was before it and that the commission's objection came too late.

4. The facts disclosed by the record support the conclusion of the commission and insular courts that the holder of the irrigation privilege is responsible for the overflow and resulting damages to private and public property. Reasonably construed, the franchise must be held to have given to the grantees control of the outlet and to have bound them to keep it sufficiently clear, for the passage of waters from the lake to the bay, to prevent raising them above the designated levels. The findings of fact included in the report of the commission and decisions of the insular courts, based as we must assume on adequate evidence, indicate that Russell & Company allowed the outlet to become and remain filled up and that the obstruction caused the waters to overflow and keep submerged the large contiguous area that is above referred to. Having regard to the quasi public nature of the privilege, the extended period of the holder's default, the character of the resulting damages and the commission's authority to terminate for breach of condition on which the grant was made, the order of cancelation is clearly not shown to be capricious, arbitrary or otherwise contrary to law. Russell & Company have failed to establish any ground upon which it may be set aside. *Kern River Co.* v. *United States*, 257 U. S. 147, 155. *Farnsworth* v. *Minn. & Pac. R. R. Co.*, *supra*, 68. *Union Land & Stock Co.* v. *United States*, 257 Fed. 635, 637.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.